(13)

No. 90-1419-CFX
Status: GRANTED

Title: National Railroad Passenger Corporation, et al., Petitioners
v.
Boston and Maine Corporation, Inc.

Docketed:
March 11, 1991

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
90-1769

Counsel for petitioner: vom Eigen,Robert P.

Counsel for respondent: Goldbloom,Irwin, Solicitor General, Stark,Charles A., Sweeney,Daniel J., Lee,Rex E.

Entry	Date	Note	Proceedings and Orders
1	Mar 11 1991	G	Petition for writ of certiorari filed.
2	Apr 1 1991		Brief of respondent Windsor Minerals, Inc. in support of petition filed.
3	Apr 1 1991		Brief of respondent Vermont in opposition filed.
4	Apr 3 1991		DISTRIBUTED. April 19, 1991
5	Apr 10 1991	X	Brief of respondent Boston and Maine Corporation in opposition filed.
7	Apr 10 1991		Order extending time to file response to petition until May 11, 1991.
8	May 9 1991		Waiver of right of respondent ICC to respond filed.
9	May 14 1991		REDISTRIBUTED. May 30, 1991
10	Jun 18 1991		REDISTRIBUTED. September 30, 1991
11	Oct 7 1991		Petition GRANTED.
			**********
12	Nov 20 1991		SET FOR ARGUMENT MONDAY, JANUARY 13, 1992. (4TH CASE)
13	Nov 21 1991		Joint appendix filed. VIDED.
14	Nov 21 1991		Brief of petitioner National Railroad Passenger Corporation filed. VIDED.
15	Nov 21 1991		Brief of respondents Vermont and Commonwealth of Massachusetts in support of petition filed. VIDED.
16	Nov 21 1991		Brief of petitioner United States filed. VIDED.
17	Nov 27 1991		CIRCULATED.
18	Dec 2 1991		Record filed.
		*	Certified record and briefs U.S. Court of Appeals for the District of Columbia (1 BOX)
19	Dec 6 1991	D	Motion of the Solicitor General for divided argument filed.
20	Dec 16 1991		Motion of the Solicitor General for divided argument DENIED. Justice Blackmun would grant this motion.
21	Dec 23 1991	X	Brief of respondents Boston and Maine Corporation, et al. filed. VIDED.
22	Dec 23 1991	X	Brief amicus curiae of Concerned Railroads filed. VIDED.
24	Jan 3 1992	X	Reply brief of petitioners United States and Federal petitioners filed. VIDED.
23	Jan 6 1992	X	Reply brief of petitioners National Railroad Passenger Corporation, et al. filed. VIDED.
25	Jan 13 1992		ARGUED.

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90-1419
No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Upon review of a final decision of the Interstate Commerce Commission approving an exercise by petitioner National Railroad Passenger Corporation of its delegated condemnation power under Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. § 562(d), a two-judge majority of the the Court of Appeals rejected the Commission's interpretation of Section 402(d), substituted its own interpretation thereof, and voided the condemnation. While petitions for rehearing were pending, Congress enacted an amendment to Section 402(d), which it specifically intended to be applied in the instant case, to correct the erroneous reading of the statute by the court. However, the Court of Appeals denied rehearing, refusing to give effect to the legislative clarification.

The questions presented are:

1. Did the Court of Appeals substantially depart from the accepted and usual course of judicial proceedings in refusing to apply an amendment to Section 402(d) which Congress adopted to correct the court's prior interpretation of the statute, and which Congress specifically intended to be applied in this case?

2. Did the Court of Appeals undermine the principles of this Court's *Chevron* decision by disregarding the Commission's reasonable interpretation of Section 402(d), in favor of an "unambiguous" reading of Section 402(d) for which there is no basis in that statute's plain language and legislative history?

PARTIES TO THE PROCEEDING

Petitioners are the National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont"). Respondent is the Boston and Maine Corporation ("B&M").*

Parties which participated in the proceedings below and are not listed in the caption of the case in this Court are the following:

1. The Interstate Commerce Commission
2. The United States of America
3. Windsor Minerals, Inc.
4. The State of Vermont
5. The Commonwealth of Massachusetts
6. Canadian Pacific, Ltd.
7. The Railway Labor Executives Association

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* Amtrak is a national passenger railroad created by an act of Congress and incorporated in the District of Columbia. The United States Department of Transportation is its controlling shareholder, and the majority of its board of directors consists of federally-appointed members. Various commercial railroads maintain dormant equity interests in Amtrak, exercising no control and receiving no financial benefit by virtue of such interests. Central Vermont is a regional rail carrier serving New England, and is incorporated in the State of Vermont. All of its stock is owned by Grand Trunk Corporation, a non-carrier holding company incorporated in Delaware. Grand Trunk Corporation is wholly owned by the Canadian National Railway Company, a Crown corporation of Canada wholly owned by the Canadian government. B&M is a wholly-owned subsidiary of Guilford Transportation Industries, Inc., a privately-held corporation. These disclosures are made pursuant to Rule 29.1 of this Court's Rules.

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IN THE

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OCTOBER TERM, 1990

No. ___

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,

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v.

BOSTON AND MAINE CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 10, 1990, and its Order denying rehearing entered on February 1, 1991.

OPINIONS BELOW

The full opinion of the court below dated August 10, 1990, reported at 911 F.2d 743 (D.C. Cir. 1990), is re-

produced in the Appendix hereto ("App."), *infra*, at 5a-27a. The unreported order issued by the court below on February 1, 1991 denying petitions for rehearing and suggestions for rehearing *en banc* is reproduced in the Appendix at 1a-4a. The unreported order issued by the court below on February 25, 1991 granting motions to stay the issuance of its mandate is reproduced in the Appendix at 28a. The final decision of the Interstate Commerce Commission served August 9, 1988, reported at 4 I.C.C.2d 761 (1988), which was reviewed by the court below, is reproduced in the Appendix at 29a-109a. The Interstate Commerce Commission's unreported interim decisions served July 5, 1988, May 25, 1988 and April 29, 1988, are reproduced in the Appendix at 110a-112a, 113a-118a and 119a-135a, respectively.

JURISDICTION

The judgment of the court below was entered on August 10, 1990. App. 5a-27a. Petitioners Amtrak and Central Vermont, together with certain other intervening parties below, jointly filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 24, 1990. The Interstate Commerce Commission (the "Commission"), a respondent below, also sought rehearing. These Petitions were denied on February 1, 1991. App. 1a-4a. On February 25, 1991, the court below granted motions to stay its mandate until March 11, 1991, pending applications to this Court for a writ of certiorari. App. 28a. This Petition for Writ of Certiorari was filed thereafter on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The decision of the court below and the denial of the petitions for rehearing rest upon the court's interpretation of Section 402 of the Rail Passenger Service Act

("RPSA"), 45 U.S.C. § 562 (1988), and a 1990 amendment to Section 402(d)(1) of the RPSA, The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990). In denying rehearing, the court also interpreted Section 305(d) of the RPSA, 45 U.S.C. § 545(d) (1988). These statutory provisions are reprinted in full in the Appendix at 136a-145a.

STATEMENT OF THE CASE

This case presents important questions arising under the RPSA, the statute that governs the federal program for providing long-distance rail passenger transportation in this country. At issue is the scope of Amtrak's statutory authority to condemn the property of another railroad where the property is required for Amtrak's federally-funded service. Also at issue is the power of a federal appellate court to overrule permissible interpretations of law by an expert administrative agency concerning a statute administered by the agency, and to ignore a precisely targeted statute that Congress expressly intended be applied to the case before the court.

Congress created Amtrak in 1970, pursuant to the RPSA, in order to ensure the provision of modern, efficient, cost-effective intercity rail passenger service on a nationwide basis. Because such service has not been operated profitably for several decades, Congress supports Amtrak with both capital grants and annual operating subsidies. *See generally* 45 U.S.C. § 601. Congress amended the RPSA in 1973, granting Amtrak, in Section 402(d), the power to condemn railroad property when Amtrak determines that acquisition of control of that property best meets its needs in connection with providing intercity rail passenger service. When the court below issued its first decision in this case, greatly inhibiting Amtrak's exercise of that delegated condemnation power, Congress acted again, while the petitions for rehearing were pending,

promptly amending Section 402(d) in order to correct the court's erroneous reading of the statute and to affect specifically the outcome in this case. The court's subsequent denial of rehearing, based on its conclusion that the amendment was inapplicable, was an impermissible result and constitutes an extraordinary circumstance calling for review by this Court.

A. Factual Background

Amtrak's exercise of its Section 402(d) condemnation authority in April of 1988 to acquire a 48.8-mile segment of the Connecticut River Line ("the Line"), then owned by B&M, was the culmination of several years of unsatisfactory dealings between Amtrak and B&M regarding maintenance of the Line. From 1972 until April 1987, the Line served as a part of the route for Amtrak's *Montrealer* passenger trains between Washington, D.C. and Montreal, Canada. In 1977, Amtrak and B&M negotiated an operating agreement that governed the operation of the *Montrealer* on B&M's lines until the agreement was unilaterally terminated by B&M in 1987. B&M agreed to exercise its "best efforts" to maintain its rail lines to permit passenger trains to operate "at not less than" the speeds prescribed in the agreement and, from 1977 to 1981, B&M maintained the Line sufficiently to allow generally satisfactory on-time performance by the *Montrealer*.

In the early eighties, maintenance of the Connecticut River Line by B&M significantly decreased, with an inevitable adverse impact on Amtrak's service. From May 1986 through April 5, 1987, when Amtrak discontinued *Montrealer* service due to deterioration of the Line, not one train met its contractually agreed-upon schedule, and 47 of the segment's 49 miles were subject to speed restrictions—many as low as 10 m.p.h. B&M traffic was being rerouted off the Connecticut River Line onto a parallel line that had been acquired by B&M's corporate parent, Guilford Transportation Industries, Inc. ("Guilford"),

and Amtrak was informed that the Line did not require additional work to meet B&M's needs for freight train operations. After litigation to compel B&M to participate in contractually agreed-upon arbitration—*see National Railroad Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988)—Amtrak obtained an arbitration decision in 1988 that B&M had breached its contractual obligation to maintain the Connecticut River Line.

Amtrak was confronted with a dilemma. Congress had appropriated $5 million for the specific purposes of upgrading the Connecticut River Line so that the *Montrealer* could be resumed.[1] However, in light of B&M's past performance, Amtrak was justifiably reluctant to devote a substantial portion of those funds to the rehabilitation of B&M's segment of the Line without a commitment to long-term maintenance which B&M, in negotiations, proved unwilling to provide. On the other hand, Amtrak's funds simply were insufficient to allow it to purchase the Line, fully rehabilitate it, *and* finance the long-term maintenance thereof. Thus, faced with the real possibility that restoration of the *Montrealer* might be impossible, Amtrak entered into negotiations with Central Vermont.[2] These negotiations yielded, in March of 1988, several agreements under which Amtrak would purchase or condemn the Connecticut River Line and then transfer fee title to Central Vermont; Amtrak would pay Central Vermont up to $3.1

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[1] Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-448 (July 11, 1987).

[2] Central Vermont owned segments of the Connecticut River Line adjoining the segment owned by B&M, and for many decades the two carriers operated over each other's portions of the Line pursuant to trackage rights agreements. The deterioration of B&M's segment of the Line had a significant detrimental impact on Central Vermont's freight service and increased Central Vermont's operating expenses. Unlike B&M, Central Vermont had no parallel route over which to provide freight service. Thus, when Amtrak turned to Central Vermont after being unable to reach a satisfactory arrangement with B&M, Central Vermont was quite naturally receptive.

million to promptly upgrade the Line to a condition suitable for Amtrak's high-speed passenger service; and Central Vermont would maintain the Line in such condition for a period of 20 years and allow operation of Amtrak's service during that time on a basis that justified the investment of federal funds by Amtrak. When B&M declined Amtrak's offer to purchase the Line, Amtrak initiated Section 402(d) proceedings before the Commission.

B. Proceedings Below

1. The Commission Decision

Section 402(d) requires that Amtrak and the prospective condemnee rail carrier be "unable to agree upon terms for the sale to [Amtrak] of [the] property" Amtrak proposes to condemn. *See* 45 U.S.C. § 562(d)(1). The statute then sets out two considerations by which the Commission is to assess the validity of the proposed taking. Amtrak's need for the property "shall be deemed to be established" unless the Commission finds both that the condemnation significantly impairs the condemnee railroad's ability to carry out its obligations as a common carrier, and that Amtrak's need for the property for purposes of providing rail passenger service could be met by the acquisition of alternative property. 45 U.S.C. §§ 562(d)(1)(A), (B). The statute authorizes the Commission to prescribe reasonable terms and conditions, including just compensation, for the condemnation.

In an interim decision served April 29, 1988, the Commission found that, in light of Amtrak's history of unsatisfactory dealings with B&M and B&M's rejection of Amtrak's valid offer to purchase the Line, "Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line," within the meaning of the statute. *National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, ICC Finance

Docket 31250, Slip op. at 7 (served April 29, 1988). App. 131a. In a second preliminary ruling, the Commission addressed and rejected B&M's verified petition requesting that the Commission convert Amtrak's Section 402(d) application into an application for trackage rights on the Connecticut River Line under Section 402(a) of the RPSA, 45 U.S.C. § 562(a). It held that Amtrak was entitled to determine, in its discretion, that the property interests available to it pursuant to the provisions of Section 402(a) were inadequate to meet its needs. *National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, ICC Finance Dockets 31250 and 31259, Slip op. at 2 & n.1 (served May 25, 1988). App. 114a-116a.

Having resolved these issues going to the right of Amtrak to proceed under Section 402(d),[3] the Commission, in its final decision, addressed the specific statutory criteria imposed by Congress in Section 402(d) as the *sole* limitations upon Amtrak's exercise of its condemnation authority under the statute. App. 45a-46a. Addressing Section 402(d)(1)(B) first, the Commission considered and rejected each of the rail routes identified by the parties as possible alternative means for Amtrak to accomplish its objectives of resuming the *Montrealer* and providing passenger train service to certain areas of New England which were left without such service when the *Montrealer* was discontinued. 4 I.C.C.2d at 772-73. App. 46a. Although not required to do so in light of its finding that Amtrak could not meet its needs through the acquisition of alternative property,

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[3] In its final decision, the Commission reaffirmed the determinations made in its interim decisions of April 29 and May 25, 1988. *See National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, 4 I.C.C.2d 761, 768-69 & n.8, 770 (1988). App. 40a, 42a. The Commission also declined B&M's invitation to find, based on various arguments, that Section 402(d), as interpreted by the Commission, is unconstitutional. *Id.* at 771-72. App. 43a-45a.

the Commission also considered the separate question, under Section 402(d)(1)(A), of the impact of the condemnation on B&M's ability to meet its continuing common carrier obligations. In that regard, the Commission found that in addition to being awarded just compensation, "[B&M] has the option of retaining its local traffic [on the Connecticut River Line] through a trackage rights agreement. Its ability to carry out its common carrier obligations . . . will not be impaired." *Id.* at 773. App. 46a. Thus, finding neither of the independent statutory criteria limiting Amtrak's condemnation power to be satisfied, the Commission concluded "that Amtrak has established its need under § 402(d) to warrant conveyance of the Conn River Line for the restoration of the Montrealer passenger service." *Id.* The Commission made no attempt to assess Amtrak's "need" for the property other than in accordance with the clear statutory standards.

Also in its final decision, the Commission resolved the issues presented in *Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corp.*, ICC Finance Docket 31259, wherein Central Vermont sought an exemption, pursuant to 49 U.S.C. § 10505, from plenary Commission review, under 49 U.S.C. §§ 11343 *et seq.*, of its acquisition from Amtrak of title to the Connecticut River Line property condemned by Amtrak. Based upon its findings that: (1) a grant of trackage rights to B&M would ensure a continuation of its ability to compete on the Connecticut River Line; (2) Central Vermont's ability to compete with B&M for new traffic on the Line would be procompetitive; (3) Central Vermont's upgrading and maintenance of the Line would enhance its own *and* B&M's ability to provide competitive service; (4) the exemption would enable Central Vermont to undertake rehabilitation of the Line on an expedited basis in furtherance of Congress's intent in appropriating funds for that purpose; and (5) the directly-affected

States—Massachusetts, New Hampshire and Vermont—all favored the transaction, the Commission concluded that the exemption sought by Central Vermont should be granted. *Id.* at 800-01. App. 84a-85a.[4]

2. The Decision Of The Court Below

In its Petition for Review filed in the Court of Appeals pursuant to 28 U.S.C. §§ 2321, 2342, B&M argued that the Commission had misinterpreted and misapplied Section 402(d). B&M insisted that all Amtrak actually needed to acquire for purposes of restoring its *Montrealer* service was *joint use* with B&M of the Connecticut River Line, and not full ownership and control of the Line. The Commission, as respondent, and Amtrak, Central Vermont and others, argued, conversely, that the underlying factual record showed that Amtrak's condemnation met the statutory requirements and was well justified in light of B&M's long-standing failure to maintain the Connecticut River Line and Amtrak's need to protect Congress's substantial investment in the rehabilitation of the Line. They also argued that the trackage rights the Commission provided B&M adequately protected B&M's competitive posture on the Line, and that the reconveyance of the Line from Amtrak to Central Vermont presented no genuine statutory or constitutional concerns.

The crux of the decision of the court below is the panel majority's total acceptance of B&M's contentions regarding Amtrak's allegedly improper purposes in seeking condemnation of B&M's property. Adopting the factual

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[4] The Vice-Chairman of the Commission, Commissioner Andre, did not participate in the final decision. Chairman Gradison filed a dissenting opinion, arguing, in essence, that Amtrak was being permitted to condemn property in excess of that "required [by Amtrak] for intercity rail passenger service" within the meaning of the statute, and questioning whether the condemnation satisfied the "public use" requirement of the Fifth Amendment. *See* 4 I.C.C.2d at 808-14. App. 95a-105a.

allegations in B&M's briefs, the majority held that Amtrak may not condemn any interest in rail property which it does not intend to retain thereafter in its own hands. *See generally Boston & Maine Corp. v. Interstate Commerce Commission*, 911 F.2d 743, 749 (D.C. Cir. 1990) ("The issue . . . is whether Amtrak has the authority to use section 402(d) to effect a change in ownership of rail lines between other parties. . . . [W]e conclude that the [RPSA] does not permit Amtrak to take property by eminent domain for which it concededly has no need itself . . . ."). App. 15a.

The panel majority undertook an independent assessment of Section 402(d)'s language, context and legislative history. It construed Section 402(d) differently than the Commission had, and found that the meaning of the statute was "unambiguous". The court stated that:

> It is clear enough that the statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service. Yet, in the case before us, it is evident that the conveyance to Amtrak was one in form only, a necessary formality in consummating a scheme whose purpose was to effect a transfer of B&M's property not to Amtrak, but to Central Vermont.

Id. at 750 (emphasis in original; citations omitted). App. 17a.

The court found that the Commission erred in failing to give full consideration to B&M's contentions that the only interest actually "required [by Amtrak] for intercity rail passenger service" within the meaning of the statute was "use [of the Connecticut River Line] in a condition permitting resumption of the Montrealer service," and that Amtrak could have met its needs by some means short of condemning a fee interest in the Line. *Id.* App. 18a. In this regard, the court below rejected the Commission's

factual findings that Amtrak "needed" not only use of a rehabilitated Connecticut River Line but also the assurance that the tracks would be held and properly maintained by a responsible owner—*i.e.*, Central Vermont—on an on-going basis. *Id.* at 751. App. 20a. The court below also stated that an interpretation of the statute which would permit Amtrak to condemn one private railroad's property in contemplation of immediate reconveyance thereof to another would give rise to "at least colorable Fifth Amendment problems[.]" *Id.* at 752. App. 21a.[5]

Concluding, the court below stated that the Commission's interpretation of Section 402(d) permitted Amtrak "to circumvent the requirements of section 402(a)" and that the Commission's "construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d)[.]" *Id.* at 753. App. 23a.

Writing separately to concur only in the result—*i.e.*, remand to the Commission—Judge Ruth B. Ginsburg disagreed with the interpretation of Section 402 adopted by the majority, observing that "[n]othing in the text of the RPSA, or in its legislative history," required Amtrak to proceed under Section 402(a), or seek condemnation of a mere easement under Section 402(d), in order to accomplish its objectives in this case. 911 F.2d at 753-54 & n.* (Ginsburg, J., concurring in the result). App. 24a-25a.[6]

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[5] The court also opined, adopting arguments by B&M never made to the Commission, that its interpretation of Section 402(d) was dictated by Congressional "policy against cross-subsidization, that is, against having one segment of the rail industry bear the expense of facilities and improvements of primary benefit to another." 911 F.2d at 752 (citation omitted). App. 22a.

[6] Judge Ginsburg believed a remand to the Commission was required based on her opinion that the Commission made insufficient findings of fact to support its approval of Amtrak's determination that taking a full fee interest in the Connecticut River Line was "required for intercity rail passenger service." 911 F.2d at 754-55. App. 25a-27a.

3. The Denial Of Rehearing

The petitions for rehearing initially focused upon the failure of the court below to extend proper deference to the Commission's interpretation of Section 402(d), and highlighted the significant errors in the court's interpretation of the statute and in its *de novo* findings of fact. The petitions also pointed out the fundamental conflict between the majority's decision and the holding of the Second Circuit in *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987).

While the petitions were pending, Congress took action to clarify Section 402(d) by means of amendment, so as to correct what Congress plainly regarded as an erroneous interpretation of the statute by the court. Thus, Congress added a sentence to the end of Section 402(d)(1), stating as follows:

> [Amtrak] may subsequently convey title or other interest in such [condemned] property to a third party, if such reconveyance is found by the [Interstate Commerce] Commission to further the purposes of [the RPSA].

The Independent Safety Board Act Amendments of 1990, Pub. L. 101-641, § 9(a), 104 Stat. 4654, 4658 (November 28, 1990). App. 145a. The amendment was explicitly made applicable to pending cases. *Id.*, § 9(b).

Notwithstanding the intervening legislative clarification of Section 402(d), the court below denied rehearing. The court acknowledged that Congress intended that the amendment be applied in the instant case. *Boston & Maine Corp. v. Interstate Commerce Commission*, Nos. 88-1631 *et al.*, Order at 3 (D.C. Cir. February 1, 1991) (*per curiam*). App. 3a. The court nonetheless refused to apply the amendment, because it "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for

intercity rail passenger service.' " *Id.* The court below also concluded that the Second Circuit's decision in the *Two Parcels* case was distinguishable. Thus, the earlier determination by the two-judge majority below was sustained. Judge Ginsburg specifically reiterated her disagreement with the majority's reading of Section 402(d).[7]

REASONS FOR GRANTING THE WRIT

The legislative clarification of Section 402(d) resolved, beyond doubt, that the statutory interpretation adopted by the court below was fundamentally flawed and incorrect; it also imposed a specific legal standard for the court to apply in any further proceedings in this case. The court's denial of rehearing, under these circumstances, goes beyond mere error. Rule 10.1(a) of this Court's Rules recognizes this Court's authority to exercise its supervisory review powers in certain cases where the nature and magnitude of a lower court's error is so extraordinary as to constitute a substantial departure "from the accepted and usual course of judicial proceedings."[8] Here, the blatant disregard demonstrated by the court below for the clear will and intent of Congress justifies petitioners' invocation of that standard. Moreover, even if the court below had not so clearly erred in failing to apply the Congressional amendment, review is still appropriate since the court's initial rejection of the Commission's interpretation of the RPSA contravened this Court's *Chevron* decision and its progeny, and is in irreconcilable conflict with a decision of the Second Circuit. Finally, important policy considerations counsel in favor of granting the writ.

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[7] Judge Ginsburg noted that the amendment "coincides with my view that the Interstate Commerce Commission (ICC) plausibly interpreted section 402[.]" App. 4a (citations omitted).

[8] *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 570-71 & n.1 (1979).

I. THE COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO APPLY AN AMENDMENT TO SECTION 402(d) SPECIFICALLY INTENDED BY CONGRESS TO CORRECT THE COURT'S ERRONEOUS PRIOR INTERPRETATION OF THAT STATUTE

Last term, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, ___ U.S. ___, 110 S. Ct. 1570 (1990), this Court held that where Congress alters an existing statute during the pendency of an appeal involving the statute, the applicability of the legislative amendment is determined by reference to expressed Congressional intent. This Court concluded that the pre-amendment law governed, in light of the evidence of clear Congressional intent to that effect. 110 S. Ct. at 1577. This conclusion was required, according to the Court, by the general rule in cases involving statutes amended during the pendency of litigation that "where the congressional intent is clear, it governs." *Id.* (citations omitted). The court below flatly disregarded that rule in this case.

When Congress amended Section 402(d), it specifically intended to correct the erroneous interpretation of that statute adopted by the court below. In substance, the amendment states: "[*Amtrak*] *may subsequently convey title or other interest in* [*condemned*] *property to a third party*, if such reconveyance is found by the Commission to further the purposes of this Act." The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a) (emphasis added). App. 145a. Congress left no doubt that this amendment to Section 402(d) was to apply to pending litigation—*i.e.*, the instant case. "The amendment . . . *shall apply* to any proceeding instituted before, on, or after the date of enactment of this Act *(including any proceeding pending before any Federal court on such date of enactment)*." *Id.*, § 9(b) (emphasis added). The legislative history, as elaborated by the sponsor of the amendment, confirms the point. *See* 136 Cong. Rec. S17668 (daily ed. October 27, 1990) (statement of Sen. Jeffords):

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. *The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.*
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purpose under the Rail Passenger Service Act, as it did in the Montrealer situation. This leaves the structuring of the nationwide passenger rail system to Amtrak's considered discretion, as the Rail Passenger Service Act intends. [Emphasis added.]

In light of this Court's recent statement in *Kaiser Aluminum* that "where the congressional intent is clear, it governs," 110 S. Ct. at 1577, rehearing should have been granted, and the Commission's decision should have been reinstated and affirmed.

The court below did not dispute that Congress intended the amendment to apply, but it nevertheless refused to apply it, purportedly on the basis that Amtrak's condemnation of a fee interest in the Connecticut River Line was invalid "in the first place". It stated that "[t]he court construed Section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power." Order at 3. App. 3a. Even if such a determination

by the court were correct at the time it initially ruled on the Commission decision, it plainly was no longer valid when the court acted on the petitions for rehearing. After the initial decision, Congress looked at the transaction that the court had overturned and adopted legislation authorizing Amtrak to reconvey interests in property it has obtained through its exercise of its Section 402(d) condemnation authority. In other words, in response to the court's initial decision, Congress specifically provided that Amtrak *could* condemn larger interests in property than it intended to retain.

If a condemnation by Amtrak under Section 402(d) is invalid "in the first place" to the extent that the property interest to be condemned exceeds that which Amtrak intends to keep for itself, as the court below held, then the Congressional amendment to the statute is rendered meaningless. Under that view, Amtrak could *never* condemn any interest in property in excess of what it intends to keep. How then could it ever *reconvey* condemned interests to a third party pursuant to Section 402(d) as amended?[9]

Seen in this light, Congress could have had no other intention than to *validate* precisely the form of condemnation/reconveyance transaction that the court below, by denying rehearing, has precluded. Senator Jeffords' explanation of the amendment leaves no doubt in this regard. Under *Kaiser Aluminum*, the court below was not at liberty to disregard the clear will of Congress by refusing to apply the amendment to Section 402(d). The amendment

[9] Since the Interstate Commerce Act, as amended, already provides authority for railroads, including Amtrak, to transfer lawfully acquired rail property to other carriers, *see* 49 U.S.C. § 11343, the amendment to Section 402(d) must have been intended to serve a different purpose—*i.e.*, to clarify that Amtrak may condemn an interest in property greater than what it specifically intends to keep for itself, and reconvey interests in what it condemns to a third party, so long as the whole two-step transaction facilitates Amtrak's satisfaction of its statutory objectives under the RPSA.

effectively limited the court's options: the court could either conclude that the Commission's prior findings were adequate, or remand the case for a determination by the Commission, in the first instance, as to whether Amtrak's reconveyance of the condemned property to Central Vermont would "further the purposes of [the RPSA]." Denial of rehearing in these circumstances thus violated not only the substantive result intended by Congress, but also the procedures by which Congress intended that result to be reached. The court below failed to implement the amendment and precluded the Commission from doing so. A writ should issue to allow this Court to correct the lower court's clear and substantial error.

II. THE COURT BELOW IMPROPERLY REJECTED THE COMMISSION'S INTERPRETATION OF SECTION 402(d), WHICH WAS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND ITS LEGISLATIVE HISTORY

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated the principles governing judicial review of interpretations by administrative agencies of the statutes they are entrusted by Congress with the duty to administer. Those principles, which were recently restated by this Court in *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), indicate that a reviewing court may reject an agency's reading of a statute it administers only when that statute is "clear and unambiguous". If the language of the statute does not clearly address the legal issue before the agency, the reviewing court's function is only to determine whether the agency's interpretation reflects a "permissible construction of the statute." 486 U.S. at 291-92. If the agency's reading of the statute is "permissible", the reviewing court is bound by that reading. *Id.*

The majority below paid lip service to these principles, 911 F.2d at 749 (App. 15a-16a), but independently concluded that the language of Section 402 is unambiguously

contrary to the Commission's interpretation thereof. *Id.* App. 16a. However, this Court did not intend for the careful analytical framework it established in *Chevron* to be circumvented in the high-handed manner exhibited by the court below, which used a baseless finding of statutory "clarity" to supplant the Commission's reading of Section 402(d) with its own.

In employing the methodology established by this Court in *Chevron*, a reviewing court must ask first "whether Congress has *directly* spoken to the *precise question* at issue." *See* 467 U.S. at 842 (emphasis added). For this purpose, the court must "turn first to the language of the statute." *Mead Corp. v. Tilley*, ___ U.S. ___, 109 S. Ct. 2156, 2162 (1989) (citations omitted). In so doing, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (footnote omitted); *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

The court below purports to have examined "the language . . . of subsection (d) and the structure of section 402" in reaching its conclusions that (i) the statute unambiguously prevents Amtrak from condemning property under Section 402(d) where a lesser interest in property obtainable under Section 402(a) might be sufficient for Amtrak's needs in providing rail passenger service, and (ii) Section 402(d) unambiguously limits the scope of Amtrak's condemnation power to the acquisition of only such property interests as Amtrak intends to retain as its own. *See* 911 F.2d at 749. App. 16a. However, subsections (a) and (d) of Section 402, respectively, are *utterly silent* with regard to the limitations on Amtrak's condemnation power imposed by the court below.

Section 402(a) enables Amtrak to ask the Commission to compel Amtrak's use of tracks and facilities owned by other railroads, and to fix the terms and conditions of

Amtrak's payment for such use to the extent that Amtrak and the other railroad cannot agree. App. 139a. Section 402(d), which was enacted three years later, addresses *condemnation* by Amtrak of the property of another railroad, for purposes of its provision of intercity rail passenger service, when the other railroad is unwilling to sell the property voluntarily. App. 141a. The provisions address distinct subjects, and neither subsection even *mentions* the other. Section 402(d) contains no language, plain or otherwise, limiting Amtrak's exercise of its condemnation power to only those situations where its need for property in furtherance of providing rail passenger service cannot be satisfied by proceeding pursuant to Section 402(a). Nor did subsection (d) *on its face*—even prior to the recent clarifying amendment—limit Amtrak's exercise of its condemnation power to the acquisition of only such interest in property as Amtrak intended to continue to own indefinitely.

The court below believed that its "unambiguous" construction of Section 402(d) was supported by the legislative history of the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, which amended Section 402 of the RPSA by adding subsection (d). *See* 911 F.2d at 749. App. 16a-17a. The cited legislative history, however, simply does not support the court's interpretation; if anything, the Congressional intent reflected therein *conflicts* with the court's "unambiguous" reading. The legislative history recognizes that certain properties which may be available under Section 402(a) may nevertheless be *inadequate* for Amtrak's purposes, due to economic or other considerations.[10] Nothing in the legislative history of Section 402(d) supports the view that Amtrak is precluded from invoking

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[10] "[Leased] facilities are not always best adapted to Amtrak's needs, *nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility.*" S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphasis added), *cited in* 911 F.2d at 749. App. 16a.

its condemnation power simply because use of the property it seeks to acquire might be available pursuant to Section 402(a). The legislative history is equally devoid of language prohibiting Amtrak's reconveyance of condemned property.

Accordingly, the court below erred in failing to recognize that neither Section 402(d) nor its legislative history indicates that Congress has "directly spoken to the precise question[s]" of either mandatory election of Section 402(a) remedies in a case of this kind, or limitations on the scope of the property interest Amtrak may condemn. The statute, and its legislative history, are *silent* as to these limitations on Amtrak's Section 402(d) powers. This plain error had significant consequences for the court's ultimate decision because "if the statute is silent . . . with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnotes omitted).[11]

The Commission applied Section 402(d) as written—*i.e.*, without inferring limits on Amtrak's condemnation power which the statute, on its face, does not impose. Having found that Amtrak and B&M were "unable to agree" within the meaning of the statute, the Commission read the statute to require its approval of the condemnation, absent affirmative findings under *both* Sections 402(d)(1)(A) and 402(d)(1)(B). 4 I.C.C.2d at 772. App. 45a. The Commission found that the trackage rights condition it imposed upon the condemnation protected B&M's ability to fulfill

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[11] *Accord Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment) ("This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." (Citations omitted.)).

its common carrier obligations on a continuing basis, and that none of the alternative rail routes it considered would adequately meet Amtrak's requirements for reestablishing and perpetuating its *Montrealer* service. *Id.* at 772-73. App. 45a-46a. This plainly plausible and, indeed, clearly correct interpretation of the statute was entitled to deference by the court below, as mandated by *Chevron*.[12]

Chevron and its progeny establish a clear analytical framework to guide the appellate courts in balancing their obligation to apply statutes as they are written by Congress with their limited role in reviewing agency decision-making. The result reached by the majority below threatens that framework and, absent intervention by this Court, invites other courts to likewise substitute their judgments for those of the agencies to which Congress has assigned responsibility for interpreting the statutes they administer.

That the court below avoided the proper application of *Chevron*'s initial analytical step—*i.e.*, determining whether Congress has "directly spoken to the precise question[s] at issue"—is apparent from the asserted bases for the court's finding that Section 402(d) is "unambiguous". In establishing limitations upon Amtrak's condemnation power

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[12] The manifestly "permissible" character of the Commission's construction of the statute is confirmed by reference to explicit language in the legislative history of Section 402(d), which the court below simply ignored:

> Amtrak's need for the property would be deemed to be established, and the Commission would be required to order the conveyance, unless it found that such conveyance would significantly impair the ability of the railroad to carry out its obligations as a common carrier *and* that Amtrak's obligations to provide rail passenger service could be met by the acquisition of alternative property[.]

Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News at 2338 (emphasis added).

which the statute does not mention, the court relied on: (1) incomplete citations to the legislative history; (2) importation of Congressional policies against "cross-subsidization" gleaned from statutes other than the RPSA; (3) the "structure" of Section 402 as a whole; and (4) concerns as to the constitutionality of Section 402(d) as interpreted by the Commission.[13]

If the language of Section 402(d) unambiguously compelled the result announced by the majority, the resort to bases so far removed from the actual words used by Congress would hardly be necessary. More importantly, if the jurisprudence of *Chevron* and its progeny is to survive, this Court cannot condone the effort of the court below to avoid the result dictated by the rules established therein. Issuance of a writ of certiorari is clearly warranted to preserve the viability of those important rules.

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH A DECISION OF THE SECOND CIRCUIT INVOLVING A PARALLEL STATUTE GOVERNING AMTRAK'S DELEGATED CONDEMNATION POWER

The decision of the panel majority cannot be reconciled with the decision of the Court of Appeals in *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) ("*Two Parcels*"). In *Two Parcels*, Amtrak sought to condemn private property adjacent to its rail lines in New London, Connecticut, pursuant to a prior agreement with the City of New London providing that Amtrak would convey fee title to the condemned property to the City, while retaining a permanent easement allowing Amtrak access to the railroad right-of-way and its tracks over a service road the City would construct on the property. 822 F.2d at 1262-63. This condemnation was sought under Section 305(d) of the RPSA, 45 U.S.C. § 545(d) (App. 136a-138a), which authorizes Amtrak's condemnation of private *non-rail* property by means of application to the appropriate federal district court, when such property is "required [for] intercity rail passenger service." 45 U.S.C. § 545(d)(1)(B). App. 136a.

Section 305(d) and Section 402(d) are parallel condemnation statutes. They were enacted together in the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, and their post-enactment treatment by Congress provides compelling evidence that they should be construed *in pari materia*.[14]

In *Two Parcels*, the landowner challenged Amtrak's condemnation on the grounds that "since Amtrak sought to condemn his land for the purpose of conveying it to New London for the latter's use as a public street, it exceeded its [statutory] power of eminent domain[.]" 822 F.2d at 1263. Recognizing that Amtrak's delegated condemnation power is less sweeping than the government's sovereign power of eminent domain, the Second Circuit nevertheless found the taking and reconveyance involved to be consistent with Amtrak's statutory authority, as well as its overall statutory purposes under the RPSA:

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[13] The majority below illogically concluded that because of the *absence* of a clear statement from Congress that Section 402(d) allows Amtrak to reconvey condemned property, the court's doubts as to the constitutionality of the statute as interpreted by the Commission supported the court's view that the statutory language is "unambiguous". 911 F.2d at 752. App. 21a. Incredibly, when Congress obliged the court below with a "clearer statement" by amending Section 402(d), the court refused to apply it.

[14] Illustrative is the legislative history of §§ 706(f) and (g) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 125, which amended both Section 305(d)(1)(B) and Section 402(d)(1) of the RPSA to clarify that Amtrak may condemn property under those statutes "whether or not construction of new tracks and facilities is involved." *See* S. Rep. No. 499, 94th Cong., 1st Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 119-20.

> [W]e are persuaded that Amtrak did not exceed its statutory authority in the instant case. In addition to authorizing Amtrak to acquire land by eminent domain which is "required [for] intercity rail passenger service," 45 U.S.C. § 545(d)(1)(B) (1982), Congress has established a number of goals for Amtrak, including the "[e]xercise of [Amtrak's] best business judgment in taking actions to minimize Federal subsidies," 45 U.S.C. § 501a(1) (1982), and "[e]ncouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies," 45 U.S.C. § 501a(2) (1982).

822 F.2d at 1265.

The overarching Congressional policy objectives considered by the Second Circuit in evaluating the scope of Amtrak's Section 305(d) powers are equally pertinent in considering a condemnation under Section 402(d). Moreover, the factual similarities between the condemnation/reconveyance transaction approved in *Two Parcels* and the condemnation/reconveyance transaction voided by the court below in the case at bar are readily apparent. Just as Amtrak's need for a service road adjacent to its track in *Two Parcels* was "unchallenged", so too the court below found in this case that "use of B&M's line was obviously needed for the Washington-Montreal run[.]" 911 F.2d at 750. App. 18a.[15] In *Two Parcels*, Amtrak could have resorted to condemnation of a mere easement over the landowner's property under Section 305(d), instead of taking the entire fee, and built and maintained its own service road thereon. Yet the Second Circuit deferred to Amtrak's judgment that condemnation of the fee, and reconveyance thereof to the City, was the best means of fostering rail passenger service while, at the same time, serving the Congressional objectives of encouraging cooperation with appropriate local governmental interests and private parties so as to minimize the cost to the federal government of providing such service.

[15] In denying rehearing, the court below states that in *Two Parcels* "Amtrak acquired through condemnation a property right it did not previously enjoy" and that this "new property interest was unquestionably 'required [for] intercity rail passenger service[.]' " Order at 2. App. 2a. Those observations provide no basis for distinguishing *Two Parcels*. Here, prior to its Section 402(d) action, Amtrak had no contractual right to operate on B&M's Connecticut River Line, because in 1987, B&M unilaterally cancelled its Operating Agreement with Amtrak. Thus, in *both* cases, Amtrak was required to take some action in order to acquire a property interest needed in connection with its statutory obligation to provide rail passenger service.

The attempt of the court below, in denying rehearing, to sidestep *Two Parcels* is unpersuasive. Amtrak's "need" to acquire an interest in private property for purposes of providing rail passenger service is apparent in each case; the issue is whether Amtrak can (as the Second Circuit held in *Two Parcels*), or cannot (as held by the court below), condemn an interest in property required for rail passenger service greater than that which it intends to retain. A writ of certiorari should issue to allow this Court to resolve this important and fundamental conflict.

IV. IMPORTANT POLICIES AND OBJECTIVES OF THE RAIL PASSENGER SERVICE ACT WILL BE FRUSTRATED IF AMTRAK IS DEPRIVED OF ITS CONDEMNATION POWER PURSUANT TO THE DECISION BELOW

Through enactment of the RPSA in 1970, Congress created Amtrak and entrusted to it the task of reviving and maintaining a comprehensive system of modern, efficient and cost-effective intercity rail passenger service on a nationwide basis. *See generally National Railroad Passenger*

Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 454-55 (1985); *City of Philadelphia v. Baker*, 508 F.2d 279, 282 (3d Cir.), *cert. denied*, 422 U.S. 1042 (1975). Since Amtrak's creation, Congress has repeatedly acted to ensure that Amtrak has the necessary tools to accomplish its objectives at the least possible cost to the federal government and, ultimately, federal taxpayers. *See generally* 45 U.S.C. § 501a(1), (2) (Congress requires Amtrak to take actions to minimize federal subsidies, including cooperative arrangements with local government and private sector); *Two Parcels*, 822 F.2d at 1265.

Outside the Northeast Corridor, the preponderance of Amtrak's nationwide rail passenger service is rendered over trackage owned and maintained by freight railroads, and Amtrak has no alternative to the use of those rail lines. In recognition of these circumstances, Congress has established in Section 402 of the RPSA a spectrum of remedies designed to enable Amtrak to fulfill its objectives, providing that:

- Amtrak can obtain long-term trackage rights and usage of other facilities of another railroad upon terms and conditions established by the Commission;
- Amtrak may obtain trackage rights and usage of other facilities of another railroad to meet needs dictated by an emergency;
- Amtrak may condemn another railroad's property;
- Amtrak's passenger trains are accorded a preference over freight trains operating over the same rail lines; and
- Other railroads may be compelled to permit Amtrak passenger trains operating over their lines to operate at accelerated speeds.

See 45 U.S.C. §§ 562(a), (c)-(f). App. 139a-143a.

The powers these provisions confer upon Amtrak have been crucial to its establishment of sound and cooperative business relationships with freight railroads. Absent its Section 402 powers, Amtrak could obtain only such rights as the owning railroad would willingly allow, and only at such charges as the owning railroad dictated. Amtrak's viability as a corporation charged with fulfilling the Congressional mandate to efficiently provide high quality intercity rail passenger service largely depends on its extraordinary arsenal of legal rights. The perceived certainty of the remedies available to Amtrak if the parties are unable to reach agreement has contributed importantly to the stability of Amtrak's relationships with other railroads. The uncertainty caused by the erroneous interpretation and application of a key provision of Section 402 by the court below can be expected to seriously undermine Amtrak's dealings with the railroad industry.

The Section 402(d) condemnation power guarantees that Amtrak will not be foreclosed from fulfilling its statutory mandate when a recalcitrant railroad refuses to provide Amtrak with property it requires for that purpose. At the same time, the legitimate interests of the owning railroad are fully protected because: (1) the Commission has authority, pursuant to subparts 402(d)(1)(A) and 402(d)(1)(B), to deny the condemnation where Amtrak fails to establish its "need" for the property; (2) the condemnee railroad is made whole by payment of just compensation and through such conditions on the condemnation as the Commission finds warranted; (3) subsequent conveyances of condemned property to another carrier are overseen by the Commission; and (4) Congress has an extensive continuing oversight role with respect to Amtrak.

In this case, the court below impermissibly circumscribed Amtrak's authority under Section 402(d) by interpreting the statute so as to (i) require Amtrak to seek trackage rights under Section 402(a), instead of condemnation, even though Amtrak determined that trackage rights would not

suffice to meet its long-term needs, and (ii) limit Amtrak's condemnation power to only those interests in property that it intended to retain. Under the court's decision, uncooperative freight railroads are now presumably free to "hold up" Amtrak in situations where, as with the Connecticut River Line, trackage rights alone are inadequate to meet Amtrak's needs to ensure the restoration and maintenance of efficient and reliable service. This is the very scenario Section 402(d) was enacted to prevent.[16] A writ of certiorari should issue to permit this Court to reestablish the viability of Amtrak's condemnation power.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: March 11, 1991

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[16] Ironically, the majority below noted as much. *See* 911 F.2d at 749 (purpose of Section 402(d) "was to assure [Amtrak] the ability to acquire properties it needed for its intercity passenger service free of extortion"). App. 16a.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed February 1, 1991

No. 88-1631

BOSTON AND MAINE CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WINDSOR MINERALS, INC., *et al.*, INTERVENORS

and consolidated case Nos. 88-1728, 88-1731 & 88-1732

On Petitions for Rehearing

Before RUTH B. GINSBURG, BUCKLEY, and SENTELLE, *Circuit Judges*.

ORDER

Upon consideration of the petitions for rehearing filed by respondents and intervenors, the supplements thereto,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

and petitioner's opposition, it is hereby ORDERED by the court that the petitions for rehearing be and hereby are denied.

In support of their petitions, respondents and intervenors argue, *inter alia*, that the court's opinion is in conflict with *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), and that Congress's supervening enactment of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654 (1990), compels a rehearing. We disagree.

In *Two Parcels*, Amtrak acquired through condemnation a property right it did not previously enjoy, namely, a permanent easement for right of way on an adjacent service road. The acquisition of that new property interest was unquestionably "required [for] intercity rail passenger service" because Amtrak's need for the new service road for inspection and maintenance purposes was "unchallenged" and demonstrated a "significant relationship" between the condemnation and the provision of passenger service. 822 F.2d at 1265. Moreover, the Second Circuit was construing section 305(d)(1)(B) of RPSA, under which Amtrak is authorized to condemn property not owned by a railroad. 45 U.S.C. § 545(d)(1)(B). In contrast, section 402 governs Amtrak's authority to secure the use of tracks and other rail facilities owned or operated by the nation's railroads, and subsections (a) and (d) establish an interplay between Amtrak's ability to acquire trackage rights and its power to take a property interest in rail facilities when required for passenger service. *See* 45 U.S.C. § 562(a), (d). Amtrak's claim that it may resort to section 402(d) to effect a transfer between competing railroads of a line over which it already has trackage rights implicates questions of statutory construction and congressional intent, including Congress's policy against cross-subsidization within the rail industry, *see* 911 F.2d at 752-53, not germane to section 305.

Section 9 of the Independent Safety Board Act Amendments added the following language to the end of section 402(d)(1) of RPSA:

> The Corporation [Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.

Pub. L. No. 101-641, § 9(a), 104 Stat. at _ (amending 45 U.S.C. § 562(d)(1)). This amendment was specifically made applicable to any prior or pending case, including the present one. *Id.* § 9(b).

The new language plainly authorizes Amtrak to convey property *subsequent to* a condemnation that is otherwise valid under section 402(d)(1). It does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not "required for intercity rail passenger service." The court construed section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power. The court also concluded that the I.C.C. had not made adequate findings pursuant to subparagraphs (A) and (B) and thus had not properly determined that the condemnation of the Connecticut River Line was required for Amtrak's services. These conclusions are not disturbed by the statutory amendment.

PER CURIAM*

For the Court:

CONSTANCE L. DUPRÉ, Clerk

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*Because she did not join in the majority's interpretation of 45 U.S.C. § 562(a), (d), Judge Ruth B. Ginsburg neither joins in nor dissents from the court's order. Her separate statement is appended hereto.

Statement by Circuit Judge RUTH B. GINSBURG *regarding the petitions for rehearing*: Section 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654 (1990), coincides with my view that the Interstate Commerce Commission (ICC) plausibly interpreted section 402, 45 U.S.C. § 562 (1982). Furthermore, current Supreme Court precedent, as I comprehend it, does not cast constitutional doubt on the legislature's measure. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) ("where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause"). I remain of the view, however, that the Commission *itself* has not yet stated, with supporting findings, that the picture of an intransigent Boston and Maine Railroad drawn by Amtrak is in fact accurate. *See Boston & Maine Corp. v. ICC*, 911 F.2d 743, 754-55 (D.C. Cir. 1990) (concurring opinion). I would therefore remand this matter to the ICC for a clear and satisfactorily reasoned statement of its decision.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 1990 Decided August 10, 1990

No. 88-1631

BOSTON AND MAINE CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WINDSOR MINERALS, INC.,
STATE OF VERMONT,
NATIONAL RAILROAD PASSENGER CORP.,
CENTRAL VERMONT RAILWAY, INC.,
COMMONWEALTH OF MASSACHUSETTS,
INTERVENORS

and consolidated case Nos. 88-1728, 88-1731 & 88-1732

Petitions for Review of Orders of
the Interstate Commerce Commission

Eric L. Hirschhorn, with whom *William D. Coston*, *Frederick J. Killion*, and *Arlene Pianko Groner* were on the

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

brief, for Boston and Maine Corp., petitioner in No. 88-1631. *Richard K. Walker* also entered an appearance for Boston and Maine Corp.

Michael F. McBride, with whom *Paul H. Falon* and *Judith L. Truax* were on the brief, for the Commonwealth of Massachusetts, petitioner in No. 88-1732 and intervenor in No. 88-1631.

Charles I. Appler, with whom *Basil Cole*, *Robert P. vom Eigen*, *Richard F. Riley, Jr.*, and *Frederick C. Ohly* were on the brief, for National Railroad Passenger Corp. and Central Vermont Railway, Inc., petitioners in No. 88-1731 and intervenors in Nos. 88-1631, 88-1728 and 88-1732.

Charles H. White, Jr. and *John T. Sullivan* were on the brief for Canadian Pacific, Ltd., petitioner in No. 88-1728.

Louis Mackall, Attorney, Interstate Commerce Commission ("ICC"), with whom *Robert S. Burk*, General Counsel, ICC, *James F. Rill*, Assistant Attorney General, *Catherine G. O'Sullivan*, and *John P. Fonte*, Attorneys, Department of Justice, were on the joint brief, for respondents.

G. Paul Moates, *Ronald S. Flagg*, and *Terence M. Hynes* were on the brief for intervenor State of Vermont.

Daniel J. Sweeney and *John M. Cutler, Jr.* were on the brief for intervenor Windsor Minerals, Inc., in No. 88-1631.

William G. Mahoney and *John O'B. Clarke, Jr.* were on the brief for intervenor Railway Labor Executives' Ass'n in No. 88-1731.

Before RUTH B. GINSBURG, BUCKLEY, and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Concurring opinion filed by *Circuit Judge* RUTH B. GINSBURG.

BUCKLEY, *Circuit Judge*: The action here under review is the Interstate Commerce Commission's approval of the National Railroad Passenger Corporation's request for the

condemnation of 48.8 miles of Boston & Maine railroad track and attached property, which it immediately reconveyed to the Central Vermont Railroad. Because we find that the use of its condemnation power to force the conveyance of property from one private owner to another exceeded the Commission's authority under the Rail Passenger Service Act, we grant the petition for review and vacate the Commission's orders.

I. BACKGROUND

A. Statutory Background

In 1970, Congress responded to deteriorating rail conditions and passenger service by passing the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1328 (1970) ("RPSA" or "Act"). The Act provided for the creation of the National Railroad Passenger Corporation ("Amtrak") and set out various goals and guidelines for it to follow in reinvigorating intercity rail service. Section 402(a) of the Act provides, in relevant part, as follows:

> (a) [Amtrak] may contract with railroads . . . for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree . . . . In the event of a failure to agree, the Interstate Commerce Commission shall, . . . if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by [Amtrak], on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of [Amtrak] . . . shall be conditioned upon payment by [Amtrak] of the compensation fixed by the Commission.

45 U.S.C. § 562(a) (1982). Section 402(a) by its terms governs situations where Amtrak is seeking the *use* of tracks ("trackage rights"), facilities, or services owned or provided by a particular railroad.

After passage of the RPSA, it became apparent that Amtrak was often unable to lease or purchase, on reason-

able terms, properties that were required for its intercity passenger service. In response to this concern, among others, Congress passed the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 552 (1973). The 1973 Act, *inter alia*, added subsection (d) to section 402 of the RPSA, which provides in pertinent part as follows:

> (d)(1) If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the Commission for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
>
> (A) conveyance of the property to [Amtrak] would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of [Amtrak] . . . can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak] . . .
>
> the need of [Amtrak] for the property shall be deemed to be established and the Commission shall order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation.

45 U.S.C. § 562(d)(1) (1982). Section 402(d) by its terms governs the case where Amtrak seeks the *conveyance* of a railroad's property to itself.

B. Factual and Procedural Background

This case involves four consolidated petitions for review of orders of the Interstate Commerce Commission. The central participants are Amtrak, the Boston and Maine Railroad ("B&M"), and Central Vermont Railroad, the wholly owned subsidiary of Canadian National Railway Company, one of Canada's two transcontinental railroads.

The Connecticut River Line is a rail line running between Springfield, Massachusetts and White River Junction, Vermont. Prior to the transaction at issue here, B&M owned large stretches of the Connecticut River Line, while Central Vermont owned the remainder. B&M and Central Vermont have been longtime competitors in the freight rail business along the Connecticut Valley. Pursuant to a 1930 trackage agreement between the two, each had the right to operate over the other's rails. At White River Junction, the line splits into a westerly and an easterly fork. The westerly fork is owned by Central Vermont/Canadian National and continues up to St. Albans, Vermont, across the border into Canada, and on to Montreal. The easterly fork, owned by B&M, links up at the Canadian border with tracks of Canadian Pacific, Ltd., Canada's other transcontinental railroad. B&M track also splits off of this fork to serve Berlin and other towns in New Hampshire. At issue in this case is a 49-mile B&M-owned segment and associated facilities between Windsor and Brattleboro, Vermont (collectively, the "B&M segment").

Commencing in 1972, in response to a congressional determination that such service was in the public interest, Amtrak began running its "Montrealer" passenger train from Washington, D.C. through the Connecticut Valley to Montreal. The service was discontinued on April 5, 1987. Amtrak maintained before the ICC and maintains in these petitions that the discontinuation resulted directly from the poor condition of the B&M-owned tracks over which the Montrealer had to run. Amtrak alleged that B&M's failure to maintain the tracks in a condition that would permit passenger train service at 60 miles per hour ("mph") was a violation of a 1977 contract between Amtrak and B&M. B&M responded that that contract had expired and that it had no obligation other than to maintain the tracks in a condition capable of bearing its own 25 mph freight traffic. Although Amtrak maintains that B&M had stated unequivocally that it did not intend to upgrade the tracks and was considering abandonment

of the line, B&M insists that it was ready to cooperate in the project to upgrade the tracks, provided that Amtrak agreed to pay for its share of the costs. B&M states that the incremental cost of maintaining tracks suitable for trains traveling at 60 mph as opposed to 25 mph would be $400,000 per year and asserts that it was Amtrak's statutory responsibility to bear this cost.

When Amtrak became convinced that B&M was not going to upgrade the tracks, it began discussions with Central Vermont. As Amtrak did not wish to own and apparently could not afford to purchase the B&M segment, an arrangement was worked out whereby Amtrak agreed to use its powers of eminent domain under section 402(d) to effect the transfer of the property to Central Vermont. As described in an internal Central Vermont memorandum, this plan called for Amtrak to make an offer of one million dollars for the B&M segment. If B&M did not accept the offer—and the memorandum noted "we have reason to believe [B&M] will not accept it"—then Amtrak would take the B&M segment by eminent domain and reconvey it to Central Vermont. Memorandum from R. Lawless to G. Maas (Jan. 6, 1988), *reprinted in* B&M Brief at 67a-69a. In pursuit of this plan, on March 18, 1988, Amtrak and Central Vermont entered into three contracts dealing, respectively, with the acquisition of the B&M segment ("Acquisition Agreement"), the repair and rehabilitation of the segment after its acquisition ("Rehabilitation Agreement"), and operations over the property ("Operating Agreement").

Under the Acquisition Agreement, Deferred Appendix ("DA") at 225-38, Amtrak undertook to make the million dollar offer to B&M subject to the terms specified therein. DA at 231. Central Vermont agreed to provide Amtrak with the funds required to make the purchase in the event B&M accepted the offer. If B&M did not accept, Amtrak would file a section 402(d) application to acquire the property by eminent domain. *Id.* at 232. The agreement also provided that B&M would be allowed to retain the exclusive right to serve existing customers along the stretch of

track it formerly owned so long as "B&M maintains its service at levels to be specified in the trackage rights agreement." *Id.* at 230. Central Vermont, however, would have the exclusive right to serve new facilities and shippers coming into existence on the line after its conveyance to Central Vermont. *Id.*

Under the Rehabilitation Agreement, DA at 239-57, Central Vermont undertook to rehabilitate the B&M segment to standards specified by Amtrak for payments which "will in no event exceed $3.1 million." DA at 241-42. Presumably, these payments would come out of a $5 million grant that Congress had appropriated for the restoration of the Montrealer service. The Operating Agreement, DA at 258-88, which was in the form of an amendment to a 1978 contract between the two companies, required Central Vermont to maintain the B&M segment in accordance with the provisions of the earlier agreement and limited Amtrak's right to use the line to twenty years. DA at 261.

As required by the Acquisition Agreement, on March 18, 1988, Amtrak mailed a letter to B&M offering to purchase the segment for one million dollars on a fourteen-day "take-or-leave" basis. In its reply, B&M reaffirmed its continued readiness to negotiate the terms of compensation to be paid by Amtrak, expressed its willingness to submit the apportionment of the additional expenses to a third party such as the ICC, and concluded that "[i]n light of the above, it appears clear that there is no need to pursue the very complex 'offer to purchase' set forth in [Central Vermont's] letter, nor to comment in detail on the inapplicability of Section 562(d) to this situation." Letter from D. Fink to D. Sullivan (Mar. 29, 1988), *reprinted in* B&M Brief at 73a. Amtrak treated this letter as a rejection, and proceeded promptly with condemnation proceedings under section 402(d).

On April 26, 1988, the Commission issued the first of its orders, which found that Amtrak had been unable to reach agreement with B&M on the upgrading of the line.

National Railroad Passenger Corp., Finance Docket No. 31250, at 7 (Apr. 26, 1988). A series of procedural decisions followed, with B&M losing its bid to convert the proceeding into one under section 402(a) for a setting of reasonable rates by the Commission and the granting of trackage rights, as opposed to condemnation. Finally, on August 4, 1988, the Commission issued its major decision, *National Railroad Passenger Corp.—Conveyance of B&M Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, 4 I.C.C.2d 761 (1988) ("Final Decision").

In its Final Decision the Commission found that there had been a failure to agree within the meaning of section 402(d), thus entitling Amtrak to a Commission determination on condemnation. *Id.* at 768-69. The ICC rejected B&M's argument that section 402(a) required that Amtrak first move for a conveyance of track rights; rather, it saw the statute as providing Amtrak with an election of remedies, *id.* at 770, and concluded that Amtrak had met the requirements of section 402(d) and was therefore entitled to condemnation. *Id.* at 769-71.

The Commission noted that it was without authority to pass on the constitutionality of an Act of Congress, *id.* at 771, and thus specifically refused to consider B&M's constitutional argument that if section 402(d) allowed this taking, it violated the public use requirement of the Fifth Amendment's takings clause. The ICC stated in dicta, however, that it would have found this conveyance to be for a public use. *Id.* at 771-72. Moving on to the issue of just compensation, the ICC fixed it at the higher of net liquidation value and going concern value, in this case $2,373,286. *Id.* at 780-81, 791. The Commission then exempted the transfer to Central Vermont from the competition scrutiny and formal approval otherwise mandated by 49 U.S.C. §§ 11343-11345 (1982), rejecting B&M's and Canadian Pacific's contention that the conveyance would greatly diminish rail competition in the area. *Id.* at 798-801.

Commission Chairman Gradison strongly dissented from the majority's conclusion. While acknowledging that

Amtrak would have been entitled to an order conveying that portion of the B&M property which Amtrak "wanted and needed for intercity rail passenger service," Chairman Gradison believed the statute did not permit Amtrak "to restructure as between private, competing rail common carriers of freight that part of the ownership of the Conn River Line which it has admitted it does not need and does not want." 4 I.C.C.2d at 808-09.

Pursuant to the Commission's orders, the line was conveyed to Amtrak, which immediately reconveyed it to Central Vermont. Central Vermont completed an upgrading of the track using the funds granted Amtrak by Congress, and, in July 1989, the Montrealer service was reinstituted.

There are four consolidated petitions for review before the court. The first and central petition is that of B&M, No. 88-1631, which protests the approval of the forced conveyance on both statutory and constitutional grounds and objects to the way in which the just compensation figure was derived. Next, in No. 88-1728, Canadian Pacific, which is Canadian National's large rival, argues that the transfer will adversely affect competition in the rail service market. In No. 88-1731, Amtrak and Central Vermont take issue with the valuation procedure, asserting that the Commission's figure was too high. Finally, in No. 88-1732, the Commonwealth of Massachusetts objects to the Commission's failure to ensure that Amtrak retained the right to use the B&M segment for passenger service in perpetuity and raises two additional issues which, at oral argument, it agreed were either moot or not ripe for judicial review. In addition, intervenor Railway Labor Executives' Association asks that if we vacate the ICC's order, in whole or in part, we also include in any remand order a requirement that the Commission protect the interests of employees who transferred employment from B&M to Central Vermont in reliance on the ICC's decision. Because we find that the forced conveyance exceeded the ICC's authority and vacate the Commission's order approving such transfer, we need not address any of the

questions presented in the other petitions. We leave the issue of appropriate new protective arrangements for employees to the Commission in the first instance.

II. Discussion

B&M argues that in enacting the RPSA, Congress did not intend that Amtrak be able to invoke the section 402(d) condemnation power as a means of securing the use of tracks belonging to another carrier; instead, Congress established section 402(a) as the means by which Amtrak could secure trackage rights necessary to its operations in cases where the parties proved unable to agree on the terms and conditions of such use. In such cases, the Commission is authorized by subsection (a) to order that Amtrak be authorized to use the tracks "on such terms and for such compensation as the Commission may fix as just and reasonable." B&M argues that that compensation must cover at least the "incremental cost" of the use of the tracks because section 402(a) specifically provides that

> the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation.

45 U.S.C. § 562(a). B&M maintains that if Amtrak had proceeded through section 402(a), it would have been required to reimburse B&M for incremental costs attributable to Amtrak's need for 60 mph passenger service, which it estimates at $400,000 a year. B&M argues that Amtrak was essentially calling on B&M to subsidize Amtrak's passenger service because B&M was being asked to pay for a good (60 mph capacity) that was only of value to Amtrak.

B&M also asserts that such a request runs counter to congressional policy against cross-subsidization and other inefficiencies in the rail industry. *See General Am. Transp. Co. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1112 (1990). B&M argues that it would

be contrary to this policy and to the sense of the statute to interpret section 402(d) to let Amtrak do by condemnation what it cannot do under section 402(a); in fact, to allow Amtrak to find another railroad willing to offer the same service for less money, then condemn the property and transfer it to the lower bidder, would be to authorize bidding wars for Amtrak's condemnation privileges.

The Commission responds that the Act contains no provision that requires Amtrak to exhaust its remedies under section 402(a) before proceeding to section 402(d). It maintains that under the statutory scheme, Amtrak has a choice of remedies, and as long as it meets the literal requirements of section 402(d), it is entitled to a decision from the Commission on condemnation. The Commission did concede that the use of the section 402(d) proceeding was extraordinary—the first time, in fact, that it has ever been used. But the Commission defends the resort to condemnation as essential to what it candidly describes as an "imaginative financing device," namely, Amtrak's acquisition of title from B&M so that it might enter into a sale and lease-back transaction with Central Vermont on terms more advantageous than those available from B&M. As the Commission points out, this is "a well-recognized means of raising capital by selling an asset while still retaining the use of it." ICC Brief at 24.

We believe this last argument places the issue in proper focus. B&M does not dispute Amtrak's right to a condemnation determination on property that Amtrak claims it needs and wishes to acquire for itself. The issue, rather, is whether Amtrak has the authority to use section 402(d) to effect a change in ownership of rail lines between other parties. For the reasons discussed below, we conclude that the Act does not permit Amtrak to take property by eminent domain for which it concededly has no need itself merely because there is another private party that would like to have it and will pay Amtrak for the privilege of having it condemned.

As an initial observation, we note that although an agency interpretation of a statute committed to its

administration is entitled to deference, it is nonetheless well settled that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Those tools of statutory construction include not only the wording of the statute but, where appropriate, an analysis of its legislative history and structure as well. *See K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988) (in ascertaining plain meaning of a statute, court must look to language at issue as well as to the language and design of the statute as a whole); *Thompson v. Thompson*, 108 S. Ct. 513, 516 (1988) (congressional intent to create implied right of action turns on inferences from language, statutory structure, and legislative history).

On examining the language and history of subsection (d) and the structure of section 402, we conclude that its meaning is unambiguous. We begin with an examination of the meaning of the subsection's language, as reinforced by its history.

A. The Language and History of Subsection (d)

Congress added subsection (d) to section 402 three years after the enactment of section 402(a). In explaining the purpose of the proposed subsection, which the House would later adopt, the Senate Report noted:

> At the present time [Amtrak] leases terminal and other facilities from various railroads. These facilities are not always best adapted to Amtrak's needs, nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility .... Because of the relatively inflexible site requirements of property [Amtrak] typically would want to acquire, Amtrak could be put in a very disadvantageous bargaining position. ... Giving [Amtrak] the power of eminent domain, coupled with the ability to seek conveyance of the property through the Commission under this section, will insure that Amtrak can

> acquire the property necessary to perform its public service mission at a reasonable price.

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2326-27. Thus one purpose for providing Amtrak with the power of eminent domain was to assure it of the ability to acquire the properties it needed for its intercity passenger service free of extortion.

As would be expected from the congressional purpose outlined above, section 402(d) explicitly provides that if Amtrak and a railroad

> are unable to agree upon terms for the sale to [Amtrak] of property ... owned by the railroad and *required for intercity rail passenger service*, [Amtrak] may apply to the Commission for an order establishing the need of *[Amtrak]* for the property at issue and requiring conveyance thereof from the railroad *to [Amtrak]*.

45 U.S.C. § 562(d)(1) (emphases added). It is clear enough that the statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service. Yet, in the case before us, it is evident that the conveyance to Amtrak was one in form only, a necessary formality in consummating a scheme whose purpose was to effect a transfer of B&M's property not to Amtrak, but to Central Vermont.

In sanctioning that scheme, the Commission ignores the principle that the condemnation power is to be strictly construed to encompass only what is conferred by statute. *See United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (utility's condemnation power limited to those powers "expressed or necessarily implied"); Final Decision, 4 I.C.C.2d at 811 (Gradison, Ch., dissenting); *see also National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 & n.3 (2d Cir.) (holding Amtrak's condemnation power to be of the more limited statutory variety as opposed to the broader sovereign power of eminent

domain), *cert. denied,* 484 U.S. 954 (1987). First, the Commission's reading overlooks the limitation, already noted, that the property to be acquired must be for the use of Amtrak, and not one which, as here, Amtrak had no intention of retaining. As Chairman Gradison's dissent points out, the record is "shockingly clear" that Amtrak had neither the need nor the desire for the condemned interest. *Id.* at 809. The Chairman concluded, correctly, that section 402(d) does not permit Amtrak to secure the conveyance of an interest in property it does not need for its own use.

Second, even if the Commission were under no obligation to go beyond form to substance, its reading overlooks the requirement that the property taken must be one "required for intercity rail passenger service." While use of B&M's line was obviously needed for the Washington-Montreal run, Amtrak did not have to condemn the entire fee interest in the line in order to provide that service. Rather, what it required, and what in fact was all it sought in substance if not in form, was not title to the B&M segment but its use in a condition permitting resumption of the Montrealer service. As B&M points out, Amtrak could have commandeered that use under section 402(a), which authorizes the Commission to order the parties to enter into an appropriate trackage rights agreement.

B&M also argues that in the alternative, Amtrak could have invoked section 402(d) to secure an easement over the B&M segment, together with the right to improve and maintain the easement consistent with the granted use. It then reasons that as this lesser interest would meet Amtrak's needs, the condemnation of the greater interest was neither necessary nor permissible under the Act in light of the requirements of subsections 402(d)(1)(A) and (B).

These subsections require that if the requested condemnation is found to significantly impair the condemnee's "ability ... to carry out its obligations as a common

carrier," 45 U.S.C. § 562(d)(1)(A), Amtrak's need is presumed to be established *unless* the Commission *also* finds that that need can be adequately met "by the acquisition of alternative property *(including interests in property)* which is available for sale on reasonable terms to [Amtrak]." *Id.* § 562(d)(1)(B) (emphasis added). In this case, the property taken is the entire fee to a large stretch of a railroad's main line.

In light of B&M's explicit claim of significant impairment, DA 341-47, we could not uphold a Commission determination that dismisses the railroad's detailed exposition with the cursory statement that its ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont. Final Decision at 773. The statute provides that the Commission's finding on impairment focus on the "conveyance of the property to [Amtrak]" and not on post-hoc remedies aimed at ameliorating the impairment that obviously would be caused by the conveyance of the entire fee interest in a railroad's main line.

Of course, even if there is impairment, the ICC must also find that Amtrak's need can be met by an alternative property before the presumption of need is disturbed. But here we find that the Commission has not seriously addressed B&M's argument that Amtrak's requirements could be met through the conveyance of a lesser interest. The Commission's Final Decision notes that

> B&M further argues that Amtrak could achieve its purposes under § 402(d) by acquiring an easement or trackage rights for passenger service without divesting B&M of ownership,

4 I.C.C.2d at 770, and dismisses the argument with the response that

> since § 402(a) provides for trackage rights, § 402(d) must have been intended to provide more. We find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line.

Id. By equating an easement in a rail line with trackage rights available under section 402(a), the Commission concludes that nothing less than the entire fee interest in a rail line may be condemned under section 402(d). The Commission thus reads the words "interest in property" out of the statute. As Amtrak was not seeking an easement, see Amtrak Application April 4, 1988, at 17, we need not decide whether section 402(d) contemplates the condemnation of such an interest. We do conclude, however, that the Commission failed to explain its decision adequately, as its rejection of B&M's "lesser interest" argument rested on the conclusory assertion that Amtrak has demonstrated sufficient reason to justify acquisition of the line.

The Commission readily acknowledges, in its brief, that rather than obtaining a property interest, Amtrak's real purpose was to secure the transfer of the trackage from B&M to Central Vermont. The ICC asserts on appeal that what was really "needed" here was a responsible owner for the B&M segment, one that could be counted on to maintain the tracks in a condition suitable for the Montrealer; as the only way to place the property in competent hands was for Amtrak to acquire it first and then reconvey it, the interim ownership of full title was necessary to its operations. ICC Brief at 24. The statute, however, is unambiguous in its provision that "the property at issue" is the proper focus of Amtrak's need, not the desirability of substituting one private owner for another.

Moreover, even assuming that the ICC's "responsible owner" rejoinder to B&M's "lesser interest" argument had merit, it emerges for the first time on appeal. The Commission's Final Decision makes no response to that argument other than the conclusory statement that Amtrak "has demonstrated sufficient reason to justify acquisition of ownership of the line." Final Decision at 770. This is not good enough. Although agency determinations are entitled to deference, "the agency must set forth the basis of [its] decision with such clarity as to be understandable. It will not do for a court to be compelled to guess at the

theory underlying the agency's action." *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 442 (D.C. Cir. 1988) (internal quotes omitted). In light of the statutory language limiting Amtrak's condemnation privileges to interests in property that are required for intercity rail passenger service, we find that the Commission's conclusory assertions fail the requirement of reasoned decisionmaking.

Finally, in light of the tremendous expansion of Amtrak's power that the Commission's reading of the statute would allow, we would expect to see a clearer statement from Congress that such was intended. Although we do not reach B&M's constitutional argument that the forced conveyance approved by the ICC violated the public use requirement of the Takings Clause, we note that there are at least colorable Fifth Amendment problems with the statute as interpreted by the Commission. The Supreme Court has approved takings of private property for reconveyance to third parties when such transfers were central to the public interest at stake, such as breaking up oligopolistic land ownership patterns, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), or slum clearance, *Berman v. Parker*, 348 U.S. 26 (1954). We are unaware, however, of any precedent approving such forced conveyances among private parties as a "means of raising capital" or as an "innovative financing device." *See* ICC Brief at 24. A court need not reach the constitutionality of a statute to acknowledge that the existence of significant constitutional questions counsel against imputing to Congress the intention to adopt the disputed meaning in the absence of some clearer evidence than we have here. *See Eastern R.R. Presidents Conf. v. Noerr Motors*, 365 U.S. 127, 137-38 (1961). Such a rule of statutory construction is applicable even where an agency's interpretation might otherwise be entitled to deference. *See De Bartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988).

B. Structure of Section 402

As noted above, the ICC declares that because "§ 402(a) provides for trackage rights, § 402(d) must have been

intended to provide" for Amtrak's condemnation of the entire fee even though it only required those rights for its intercity passenger service. The Commission also argues that subsection (d) merely provides an alternative means for securing trackage rights that Amtrak is at liberty to exploit. With due respect, we submit that subsection (a)'s provision for Amtrak's use of a railroad's tracks reinforces our understanding of Congress's intent in adding subsection (d) to the statute.

It would seem clear that in structuring section 402, Congress has created parallel procedures by which Amtrak can secure the services, facilities, and properties it requires at reasonable costs: one procedure, detailed in subsection (a), applies when Amtrak wishes to contract for the *use* of a railroad's services, tracks, and other facilities; the other, set out in subsection (d), applies when Amtrak needs to acquire a railroad's property for its own use. This is the framework that Congress created. The Commission's reading of subsection (d), however, sanctions the acquisition of a larger property interest than subsection (a) permits for purposes that subsection (d) does not explicitly authorize. It also allows Amtrak to circumvent the requirement that it bear the cost of maintaining B&M's line at 60 mph capacity merely by finding a buyer who is willing to pay Amtrak for the use of its condemnation powers.

Our reading of the interplay between subsections (a) and (d) is further supported by Congress's policy against cross-subsidization, that is, against having one segment of the rail industry bear the expense of facilities and improvements of primary benefit to another. *See General Am. Transp. Corp.*, 872 F.2d at 1054-55. Consideration of these broader congressional policies is beyond question a legitimate factor in determining the meaning to be given words and phrases that might otherwise be ambiguous. *See Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527, 533 & n.58 (D.C. Cir. 1980). Read in the manner adopted by the ICC, the statute no longer gives effect to the policy against cross-subsidization.

Rather, the arrangement would promote cross-subsidization by permitting Amtrak to cajole a railroad into providing more than its fair share of the maintenance. Otherwise, Amtrak may condemn the property because of the "low" state of repair and transfer it to a competitor who is willing to pay a premium to secure the financial advantages that might result from acquiring its competitor's properties. Either way, this would amount to a subsidization of higher-cost passenger service by freight rail owners.

We thus conclude that the Commission's construction of the statute is contrary to its unambiguous meaning and Amtrak's use of its power of eminent domain invalid. Congress did not intend to allow Amtrak, by securing a competitor willing to deal with it on more favorable terms, to circumvent the requirements of section 402(a) and its policy against cross-subsidization, and the Commission's construction of the phrase "required for intercity rail passenger service" contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak.

III. Conclusion

Because we find the conveyance void on the grounds explained above, we do not reach B&M's further argument that the Commission did not find a "failure to agree" within the meaning of section 402(a), nor do we reach the valuation or competition issues raised by the other petitioners. As already stated, having found the Commission's interpretation invalid under the Act, we need not address B&M's constitutional argument. The petition for review in No. 88-1631 is granted; the order of the Commission approving the taking of B&M's track is set aside. The petitions in the other dockets are dismissed as moot in light of our disposition of No. 88-1631, which is remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

GINSBURG, RUTH B., *Circuit Judge, concurring in granting the petition for review in No. 88-1631*: I agree that a remand is warranted; I write separately, however, to emphasize that I rely on the inadequacy of the Commission's assessment *in this case*, not on the precedent-setting construction of the statute decreed by the majority opinion. My colleagues interpret section 402 of the Rail Passenger Service Act (RPSA), 45 U.S.C. § 562, as denying Amtrak recourse to the full eminent domain power conferred by section 402(d) when Amtrak's ultimate aim is to secure only the *use* of tracks, a use for which section 402(a) provides. I am not convinced that the court, overriding the agency, has identified the only plausible reading of the statute; nor am I persuaded that if Amtrak is accorded any leeway to choose the property acquisition route when it could instead settle simply for trackage rights, the inevitable result will be "bidding wars" among private railroad companies for Amtrak's condemnation powers.

Nothing in the text of the RPSA, or in its legislative history, appears to me to force the conclusion, reached by my colleagues, that because trackage rights are central to the challenged transaction, Amtrak had to resort to section 402(a), or, alternately, attempt to condemn a lesser property interest (*i.e.*, secure an easement) under section 402(d), before invoking in full its section 402(d) eminent domain power. My colleagues find a textual basis for their conclusion in the statute's stipulation that if a planned condemnation would "significantly impair the ability of the [target] railroad to carry out its obligations as a common carrier," 45 U.S.C. § 562(d)(1)(A), Amtrak's need for the property sought will be disproven whenever the Commission also finds that Amtrak's passenger service obligations "can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale [to Amtrak] on reasonable terms." 45 U.S.C. § 562(d)(1)(B).

The requirement that Amtrak exhaust any course short of full condemnation is triggered only when a proposed

condemnation also threatens to impair the condemnee's performance as a common carrier. In this case, the ICC specifically concluded that the acquisition of B&M's track would pose no such threat:

> [B&M] has also failed to meet criterion (A), regarding significant impairment of B&M's common carrier obligations resulting from the conveyance. B&M is receiving just compensation for the property being conveyed and has the option of retaining its local traffic through a trackage rights agreement. Its ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired.

National Railroad Passenger Corp. — Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, 4 ICC 2d 761, 773 (1988). Given this explicit ICC determination under section 402(d)(1)(A), a determination within the ICC's expertise and entitled to judicial deference, the less restrictive alternative requirement of section 402(d)(1)(B), it seems to me, is simply not implicated in this case.*

Nor do I agree that allowing Amtrak to obtain trackage rights via its section 402(d) eminent domain powers necessarily renders superfluous section 402(a)'s trackage rights acquisition authority. Before obtaining ICC approval of a proposed condemnation, Amtrak, all agree, must establish that the property or property interests it

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*My colleagues contend that in conducting the subsection (A) inquiry into impairment of common carrier obligations, the ICC should have considered the effect of the condemnation in isolation, not as potentially alleviated by post facto remedies, such as the retention of trackage rights by the condemnee. If an approach so rigid were mandated by the RPSA, however, no outright condemnation could ever occur on any railroad with significant freight traffic — a drastic result unsupported by logic or by any discernible congressional intent. *Cf.* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 137 (1978) (considering post facto remedies, such as transferred development rights, in evaluating whether historic preservation law effected a taking under the fifth amendment).

seeks to acquire are "required for intercity rail passenger service." 45 U.S.C. § 562(d)(1). It is plausible, however, as I will next illustrate, that Amtrak's fulfillment of its intercity rail passenger service obligations might on occasion require not merely trackage rights, but trackage rights in conjunction with a transfer of ownership. In such instances, and such instances alone, the ICC could properly approve a use of section 402(d) of the kind undertaken here.

I recount in this light the story Amtrak tells. Following the purchase of the B&M line and a parallel line to the west, the Delaware and Hudson (D&H), by Guilford Transportation Industries in 1983 and 1984, service along B&M's Conn River Line deteriorated drastically. By 1987, when Montrealer service was temporarily discontinued, the average travel time over the Conn River Line had increased approximately 67% over 1981 levels; according to Amtrak, B&M repeatedly refused to upgrade the line, and even slated the segment for abandonment on its 1987 system map. Amtrak suggests that B&M's intransigence may have been motivated not by Amtrak's unwillingness to pay its fair share of the cost of maintaining the line to passenger service standards, but by B&M's conscious decision to favor its parallel D&H line. *See* Joint Brief of Intervenor-Respondents National Railroad Passenger Corporation, Central Vermont Railway, Inc., State of Vermont, and Windsor Minerals, Inc. at 4, 6.

Soon after the April 1987 Montrealer shutdown, Congress appropriated $5 million for improvements needed to restore Montrealer service. *See* Act of July 11, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447 (1987). Under the circumstances as alleged by Amtrak, obtaining trackage rights from B&M under section 402(a) of the RPSA would not have sufficed to assure realization of the congressional objective to get the Montrealer back on track. B&M, in Amtrak's view, was unwilling, and would remain reluctant, to perform the necessary work: only trackage rights coupled with a change in the underlying ownership would do. Indeed, confining Amtrak to its section 402(a) avenue

under such circumstances could have left it vulnerable to just the sort of extortion by private landowners pointed to by my colleagues as having motivated Congress to confer the eminent domain power contained in section 402(d). Had the ICC found from the record that the picture painted by Amtrak was accurate, therefore, I would uphold the challenged transaction.

No such ICC determination, however, can be gleaned from this record. Tugging just the other way, counsel for the ICC conceded at oral argument that the agency had made no independent effort to ascertain whether the B&M-CV conveyance was in fact required to meet Amtrak's passenger service obligations. ICC counsel further disavowed any doubt as to B&M's competence to maintain the track in question:

> COUNSEL: Given the fact that Amtrak had this money to put into [track] rehabilitation . . . .
>
> COURT: So we're talking money?
>
> COUNSEL: It wanted to make sure that the money was well spent, under the person who was exercising control over the maintenance.
>
> COURT: Is there anything in the record to suggest that the root of the controversy between B&M and Amtrak was the competence of B&M to do the proper job . . . ?
>
> COUNSEL: No . . . .

Because these concessions indicate that the ICC shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by section 402(d) of the RPSA, I agree that the petition for review must be granted.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed February 25, 1991

No. 88-1631

BOSTON AND MAINE CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WINDSOR MINERALS, INC., *et al.*, INTERVENORS

and consolidated case Nos. 88-1728, 88-1731 & 88-1732

Before Ruth B. Ginsburg, Buckley and D.H. Ginsburg, *Circuit Judges.*

ORDER

Upon consideration of the motions for stay of mandate it is

ORDERED, by the Court, that the Clerk is directed to withhold issuance of the court's mandate through March 11, 1991.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

NATIONAL RAILROAD PASSENGER CORPORATION—CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250[1]

Decided August 4, 1988

Connecticut River Line conveyed to the National Railroad Passenger Corporation (Amtrak) under § 402(d) of the Railroad Passenger Service Act (RPSA), 45 U.S.C. § 562(d). Standards to establish compensation set and amount determined. Related petition for exemption filed by Central Vermont Railway, Inc. to acquire Amtrak's interests in the line once Amtrak has acquired those interests granted.

DECISION

BY THE COMMISSION:

By decision served April 29, 1988, we instituted the lead proceeding pursuant to an application filed by the National Railroad Passenger Corporation (Amtrak) under § 402(d) of the Railroad Passenger Service Act (RPSA), 45 U.S.C. § 562(d), for the conveyance of the Connecticut (or Conn River) Line and certain other property interests belonging to the Boston and Maine Corporation (B&M), so that Amtrak may resume its Montrealer passenger service over that line. We consolidated this proceeding with a related petition for exemption filed by Central Vermont Railway, Inc. (CV) in Finance Docket No. 31259 for its acquisition

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[1] This decision also embraces Finance Docket No. 31259, *Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation.*

of the subject line and related interests from Amtrak once Amtrak has obtained these interests and for CV's conveyance of trackage rights over the line to B&M at that time. In that decision, we also adopted an expedited schedule to allow the Commission to issue separate decisions: (1) on the issue of whether an order establishing need for the conveyance of the line and requiring the conveyance is appropriate;[2] and, if so, (2) on the issue of just compensation for the line.

We have received numerous pleadings, comments and letters concerning this proceeding.[3] A protest and comments were filed by the Railway Labor Executives' Association (RLEA) joined by the United Transportation Union (UTU). On May 16, 1988, comments in support of Amtrak's case on the issue of "need" for the line and on CV's exemption petition were filed by the Commonwealth of Massachusetts (MA), the State of New Hampshire (NH), the State of Vermont (VT) and Windsor Minerals, Inc. (Windsor). On May 31, 1988, B&M filed its evidence and argument in opposition to Amtrak's application on the "need" issue and CV's petition for exemption, and Canadian Pacific, Ltd. (CP) filed its comments and argument in opposition to CV's petition for exemption. On June 3, 1988, Amtrak filed rebuttal testimony along with proposed conditions and terms for the conveyance. Rebuttal was also filed by CV, MA, and Windsor. On June 8, 1988, the first phase of the proceeding addressing the "need" issue and

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[2] We also stated that CV's exemption petition would be decided along with the issue of "need' for the line.

[3] The Commission received 72 letters in support mainly from former passengers residing in Vermont, New Hampshire, Rhode Island, Pennsylvania, Maryland and Washington, D.C. Comments and letters were also received from the Lake Champlain Regional Chamber of Commerce in VT, City of Montreal, Congressman Sylvio Conte and U.S. Senators Bill Cohen, Christopher J. Dodd, Nancy Landon Kassebaum, Edward M. Kennedy, John F. Kerry, Patrick J. Leahy, George Mitchell, and Robert T. Stafford.

CV's exemption was completed with the filing of final briefs in support by Amtrak, CV, MA, VT, and Windsor, and in opposition by B&M and CP. RLEA subsequently filed comments in opposition to Amtrak's proposed conditions and terms.

By decision served July 5, 1988 in Finance Docket No. 31250, we stated that we considered the extensive record developed in this proceeding on the issue of need, including the letters and comments, the various related agreements between the parties, the evidence generated through discovery, and the arguments presented by the parties. Based on the evidentiary record developed, we decided that Amtrak had sustained its burden of proof and established a need for the conveyance requested. A complete discussion of that issue is set forth in this decision.

By separate decision served on July 5, 1988 in Finance Docket No. 31259, we also decided that, because certain allegations made in opposition to the exemption raised competitive issues[4] that we believed warranted a supplemented record, we would defer decision on the exemption request to allow the parties the opportunity to submit further evidence focusing on those competitive concerns. We amended our procedural schedule in this case to provide 15 days for the parties to supplement the record on competitive concerns and an additional 5 days for simultaneous

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[4] On June 23, 1988, CP filed a petition to recognize substantially changed circumstances, including the recently filed bankruptcy petition by B&M's affiliate, Delaware & Hudson Railway Company (D&H). B&M also filed a petition seeking an extension of the procedural schedule to allow consideration of these new circumstances by the Commission. On June 27, 1988, Amtrak and CV filed a joint reply in opposition to these petitions. However, Amtrak and CV stated that they were agreeable to postponing a decision on CV's petition for exemption for 10 days to allow CP and B&M to submit their competitive theories and arguments to the Commission for consideration in that portion of the proceeding. Given our findings here, no further action was necessary on these petitions.

filing of replies. The record on this portion of the proceeding closed July 25, 1988, and our decision on the exemption petition is set forth below with our decision on just compensation.

Amtrak's initial filing on just compensation was included in its April 4th application. On June 13, 1988, MA submitted its opening evidence and argument on just compensation. On June 28, 1988, Amtrak filed its supplemental evidence on just compensation.[5] On July 5, 1988, B&M filed its argument and evidence on just compensation. RLEA also filed its evidence and brief on the issue of just compensation.[6] On July 13, 1988, this second phase of the proceeding was completed with the filing of B&M's supplemental evidence in response to Amtrak's June 28th supplemental evidence and the filing of rebuttals to B&M's argument and evidence by Amtrak, MA, and VT.

We have considered the evidentiary record developed on just compensation and the parties' arguments on the methodologies for valuation. We have determined that, of the methodologies submitted, going concern value and net liquidation value are most appropriate for use here. The higher of the two constitutes just compensation for the transfer. The CV petition for exemption meets the criteria of 49 U.S.C. § 10505. Thus, all aspects of the proposal are granted, subject to certain conditions, as discussed below.

BACKGROUND

In its application filed April 4, 1988, Amtrak requested that the Commission order that a line of railroad and certain other property and contract interests belonging to

[5] Amtrak filed its confidential version of its supplemental evidence with the Commission on June 29, 1988.

[6] We will dismiss RLEA's motion for leave to file one day late, as its filings were timely received and stamped July 5, 1988, by the Commission.

B&M, a subsidiary of Guilford Transportation Industries, Inc. (Guilford), be conveyed to it pursuant to § 402(d) of RPSA. The line consists of a 48.8-mile segment of the Conn River Line. The segment runs along the Connecticut River, starting at Brattleboro, VT (approximately milepost 60.1), crossing the river at Bellows Falls, VT (approximately milepost 83.8) into New Hampshire and crossing back to Vermont near Windsor, VT (approximately milepost 108.3), where this segment ends. Specifically, Amtrak sought in its application the following property or contract interests in the Conn River Line:

(a) all rights, titles and interests (with the exception of interests in existing fiber optics leases) in the rail right of way and structures between a point where the CV-owned trackage at the north end of the Connecticut River Bridge in Windsor, VT terminates (approximately B&M milepost 108.3) and a point where CV-owned trackage at Bridge Street in Brattleboro, VT (approximately B&M milepost 60.1) commences;

(b) all rights, titles and interests in a spur track (known as the Brattleboro or West River spur) and right of way extending from the CV right of way to a line 10 feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV-owned trackage;

(c) the right to dispatch operations over the trackage between White River Junction, VT and East Northfield, MA secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930, (1930 Agreement) and other informal operating arrangements between CV and B&M;

(d) all rights, including those under the 1930 Agreement to maintain and operate the segment of CV trackage between the point north of the Connecticut River Bridge where B&M-owned trackage terminates (approximately B&M milepost 108.3) and a point adjacent to the passenger

depot at Windsor, VT (approximately B&M milepost 108.9) where CV owned and maintained trackage commences; and

(e) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

In our April 29th decision, we adopted a procedural schedule for the resolution of the proceeding and allowed the parties to conduct discovery. Parties were given five days to file with the Commission and serve on the other parties their objections to any aspect of the procedural schedule. To facilitate the expeditious resolution of this proceeding while giving parties the opportunity to conduct meaningful discovery, we granted Amtrak's petition to waive 49 C.F.R. § 1114.30 requiring parties to obtain prior Commission approval to conduct document discovery. In addition, we granted petitions to intervene filed by CP, MA, VT, and the Connecticut Department of Transportation (CDT). We denied B&M's request that the application be rejected. We found: (1) that Amtrak had sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under § 402(d); (2) that the issue of whether the transfer of the line to CV should be reviewed under the terms of 49 U.S.C. §§ 11343 and 11344 would be considered with the application on the merits; and (3) that § 402(d) does authorize the Commission to compel the conveyance of a line of railroad. Similarly, we found no need to grant CP's motion to broaden the scope of this proceeding as parties could raise any relevant issues in the consolidated proceeding and we would address them in the resolution of this case on the merits. Finally, Amtrak was given five days to file with the Commission and serve on the parties: (1) copies of its agreements with CV; (2) copies of its 1977 operating agreement with B&M; and

(3) an environmental report or explain why one is unnecessary here.

By decision served May 11, 1988, we denied objections to the procedural schedule filed by B&M and clarified the procedural schedule to provide that labor protection will be considered as part of our determination of just compensation for the line. Additionally, we granted petitions to intervene filed by RLEA and Windsor.

By decision served May 25, 1988, we denied B&M's petition to convert Amtrak's application filed under § 402(d) to an application filed under § 402(a). We granted a petition to intervene filed by NH, and although the time period for filing discovery requests had expired, we provided for discovery upon NH to ensure a fair proceeding. Also, we dismissed petitions to intervene filed by MA and VT in Finance Docket No. 31259 as both had already been made parties by the April 29th decision, which also consolidated the two proceedings.

On June 1, 1988, the Director of the Office of Proceedings denied B&M's motion to compel having found that the supplemental responses provided by Amtrak and CV adequately responded to the interrogatories and document requests made by B&M. Although certain confidential information and documents were withheld with respect to request No. 45, the Director found them to be protected by the attorney-client and/or attorney work product privilege.

By decision served June 3, 1988, we denied B&M's petition to reopen our April 29th decision. We affirmed our April 29th decision that Amtrak had sufficiently demonstrated that B&M and it had not been able to agree on the sale of the line in question to warrant the institution of a proceeding under § 402(d) and rejected B&M's argument that we committed material error in our April 29th decision regarding our power under § 402(d) to order the conveyance of the subject line.

On June 6, 1988, the Director issued a notice to the parties ordering them to include with their final briefs any comments or arguments on Amtrak's proposed conditions and terms for the conveyance of the Conn River Line included in its June 3rd rebuttal should the Commission find that Amtrak's need for the line has been established and that B&M should be required to convey the line pending a final determination of just compensation for the line.

Parties completed this phase of the proceeding on June 8, 1988, when they filed final briefs addressing the "need" issue and CV's exemption petition. As previously stated, we issued a decision in Finance Docket No. 31250 on July 5, 1988 finding that Amtrak has sustained its burden of proof and established a need for the conveyance requested and, in this decision, are setting forth our complete discussion on that issue.

The second phase (just compensation) of the proceeding was also the subject of several procedural orders. On June 7, 1988, the Acting Director granted Amtrak's motion to compel B&M to permit Mr. Paul Larner, a CV dispatcher, access to certain train dispatch sheets. On June 21, 1988, the Chairman found that a request filed by B&M for procedural relief was premature since Amtrak had not as yet late-filed any supplemental evidence on the issue of just compensation for the line. The Chairman indicated that, if Amtrak filed supplemental evidence at a later date in this proceeding, the Commission would then address whether it should be accepted and, if so, what would be required to provide B&M with an adequate opportunity to respond to that evidentiary filing. And, on June 22, 1988, the Chairman denied a motion filed by Amtrak other than to compel B&M to respond to Interrogatory No. 26, which involved information relevant to Amtrak's determination of compensation for the taking of the line based on the line's going concern value.

By decision served July 5, 1988, we: (1) denied B&M's request for an additional two weeks to submit argument and evidence on just compensation; (2) accepted Amtrak's late-filed supplemental evidence on just compensation; and (3) denied B&M's earlier motion for procedural relief. Parties were notified July 1, 1988. Also on July 5, 1988, the Chairman granted Amtrak's motion to keep confidential certain copies of the Second Supplemental Verified Statement of Robert L. Banks and Charles H. Banks filed under seal.

On July 11, 1988, the Chairman granted Amtrak's motion to permit B&M to file by July 13th additional evidence in response to issues raised by the new material in Amtrak's June 28th supplemental evidence. Amtrak argued that B&M's claim that these proceedings violated standards of due process, since B&M had not been afforded adequate time to prepare evidence in response to Amtrak's late-filed supplemental evidence, is entirely without merit and that the Commission's July 5th decision is correct. Nevertheless, Amtrak moved that B&M be afforded the opportunity to submit additional evidence.

By decision served July 19, 1988, we denied B&M's petition requesting reconsideration of the Chairman's decision compelling B&M to answer Interrogatory No. 26, which had been served on B&M on May 2, 1988.

Parties completed this second phase of the § 402(d) proceeding on July 13, 1988. Amtrak made two significant changes from its initial presentation. It incorporated into its application a trackage rights agreement for the benefit of B&M that had been contained in the CV exemption, and it reduced the amount of B&M property it sought to acquire and adjusted its proposed compensation accordingly.

As noted earlier, we held open the record in the exemption proceeding until July 25, 1988, to allow further

comments on competitive issues including the effect of the D&H bankruptcy petition.

DISCUSSION AND CONCLUSIONS

I. AMTRAK'S § 402(d) APPLICATION.

Amtrak filed an application under § 402(d) of the RPSA, 45 U.S.C. § 562(d), to require immediate conveyance of the Conn River Line from B&M to Amtrak, and as an integral part of the overall transaction, immediately from Amtrak to CV pursuant to the accompanying exemption petition, under which CV would also grant trackage rights to B&M to operate over its former line segment. As noted above, in subsequent filings Amtrak has clarified that the trackage rights over the line for B&M be included as a term and condition of conveyance in its § 402(d) application, rather than the CV exemption, and will be discussed *infra*, with our determination of just compensation of the line.

Section 402(d) provides, in relevant part, as follows:

(d) Disagreement procedures

(1) If the Corporation and railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and (B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition

of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available by the exercise of its authority under § 545(d) of this title,

the need of the Corporation shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

In its application, Amtrak acknowledges that this is an extraordinary proceeding. We agree. In fact, only once before has the Commission even had occasion to institute a proceeding under § 402(d) of RPSA, and that case was resolved before the Commission could issue a decision on the merits.[7] With this in mind, we turn to Amtrak's current application.

Amtrak states that it has exhausted all alternatives to condemnation and has found it necessary to resort to the condemnation powers under § 402(d) in this case. We acknowledged in our May 25th decision that, under §§ 402(a)-(d) of RPSA, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. In each case, relief may be granted only upon application by Amtrak, and in each case different criteria, procedures, and standards apply. *See* 45 U.S.C. §§ 562(a)-(d). Here, Amtrak has made an election of remedies by filing its application under § 402(d) for conveyance of the subject line, and has done so delib-

[7] In Finance Docket No. 30895, *National Railroad Passenger Corporation—Conveyance of Conrail Line in Wayne County, MI*, Amtrak subsequently withdrew its application stating that the parties had reached an agreement adequately protecting its interest in providing passenger service over the subject line. By decision served December 15, 1986, the Commission terminated the proceeding before addressing the statutory criteria regarding a conveyance under § 402(d).

erately. We affirm our finding, as supplemented below, that Amtrak has met the statutory criteria for the institution of a proceeding under § 402(d) and, thus, is plainly entitled under the statute to a decision on the requested conveyance of the line.[8]

A. Statutory prerequisite that Amtrak and B&M are "unable to agree" on sale terms.

In its May 31st argument and evidence, B&M rejects the Commission's findings in two prior decisions and restates its argument that Amtrak has failed to demonstrate that parties are "unable to agree" on the voluntary purchase and sale of the subject property, a necessary prerequisite to Amtrak's filing of an application under § 402(d). B&M states that it has no obligation to make any kind of proposal to Amtrak to sell the Conn River Line, but that it continues to be willing to discuss the matter. Institution of this proceeding never prohibited parties from settling this case and parties' current willingness to discuss the sale of the line has no bearing on our initial finding that the statutory prerequisite—that parties are "unable to agree"—had been met. We affirm our prior decisions finding that Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line and this warrants the institution of a proceeding under § 402(d).

B. Transaction is within the scope of § 402(d).

Again B&M maintains that § 402(d) does not authorize the Commission to compel conveyance of an existing rail line nor does it authorize Amtrak to acquire by eminent domain any line of railroad. Additionally, B&M contends that the attempt to use § 402(d) to divest B&M's ownership

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[8] B&M continues to argue statutory and jurisdictional issues under § 402(d) that we have already disposed of in previous decisions. B&M has failed to present anything that was not considered in reaching our prior decisions on these matters.

in the line and immediately to convey the line to CV through Amtrak violates the intent of the statute and abuses its processes. B&M states that the Commission would violate the rail transportation policy and public policy if it permitted Amtrak to use § 402(d) to restructure the ownership of freight lines.

As we stated in our June 3rd decision, we reject B&M's argument that we committed material error in our April 29th decision regarding our power under § 402(d) to order the conveyance of the subject line. In our April 29th decision, we found that Congress has clearly expressed its intent to sanction the acquisition of existing and operating lines of railroads by Amtrak under § 402(d) based on the clear language of the statute. B&M has failed to present anything that was not already considered in reaching our decision on that issue. Thus, we affirm our prior decisions.

With regard to the charge of abuse of process, Amtrak strongly disputes B&M's contention that Amtrak's proposed transaction constitutes an abuse of the processes under § 402(d). B&M contends that Amtrak has no discretion in the proposed transaction under the agreement between Amtrak and CV, so even if Amtrak is authorized to take the line, there is a possibility Amtrak may not proceed with the condemnation if CV exercises its right to not proceed with its acquisition which would result in a complete waste of time. Rebutting B&M's argument that the entire proposal is one by which CV and Amtrak seek to manipulate the statutory process in order to enable CV, which is a part of the Canadian National Railway, Inc. (CN) system and a direct competitor of B&M, to become owner of the Conn River Line, both Amtrak and CV confirm that the agreements leading to this proceeding were negotiated at arms length to achieve their respective corporate and public interests, and not to further some impermissible objective of CV's affiliate, CN. Contrary to B&M's argument that Amtrak has no financial stake in these proceedings, Amtrak reiterates that it will be pro-

viding more than $3 million in funds which have been appropriated specifically for its benefit by Congress.[9] Amtrak states that in exchange for this investment, it will obtain rehabilitation of the rail line, a guaranteed 20 years of proper maintenance on the rail line,[10] and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level. Amtrak also states that it has agreed to the current arrangements with CV and, unlike B&M's characterizations, Amtrak is not proceeding contrary to the scheme of the statute as it, in fact, has a voice in the proceedings. Thus, we conclude that Amtrak has demonstrated that it has not abused the process available under § 402(d) by means of its dealings with CV.

B&M also continues to assert that Amtrak could achieve the same result as it would if its application were granted by invoking the provisions of § 402(a) of the RPSA which authorizes the Commission to fix terms and conditions for use of tracks and facilities of railroads. B&M requests that the Commission reconsider its May 25th decision, in which we denied B&M's request that the proceeding be converted from one under § 402(d) to one under § 402(a). We affirm our finding that Amtrak has met the statutory criteria for the institution of a proceeding under § 402(d) and, thus, is entitled under the statute to a decision on the requested conveyance of the line.

B&M further argues that Amtrak could achieve its purposes under § 402(d) by acquiring an easement or trackage

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[9] Congress has appropriated $5 million for the rehabilitation of the line. Amtrak intends to use approximately $3 million on the subject line through Vermont and $2 million on the portion of line through Massachusetts.

[10] In its filing, MA requests that we grant Amtrak the perpetual right to operate passenger service over the line. Contrary to MA's argument, we find it unnecessary to do so because § 402(a) permits Amtrak to acquire such trackage rights in the future, in the event such action becomes necessary.

rights for passenger service without divesting B&M of ownership. However, since § 402(a) provides for trackage rights, § 402(d) must have been intended to provide more. We find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line. We find no abuse of § 402(d) processes here.

Finally, we find unfounded B&M's fears that a favorable decision for Amtrak would encourage any freight railroad to acquire ownership of a competitor's line simply by currying Amtrak's favor and agreeing to grant trackage rights to the former owner. B&M argues that allowing Amtrak to use § 402(d) to transfer ownership of the Conn River line from B&M to CV would subvert the Commission's responsibilities and would nullify the principle that Commission authorization is permissive rather than mandatory. As Amtrak points out, however, § 402(d) of RPSA contemplates transactions subject to the Commission's scrutiny, and we may impose our consolidation regulations at 49 C.F.R. Part 1180 if major competitive or other alterations might result from a subsequent conveyance of a line Amtrak acquires under § 402(d) to freight carriers. We will not permit transfers that are not in the public interest and consistent with the relevant statutory criteria. Furthermore, DOT/FRA and Congress are able to prevent any pattern of abuse through their supervision of Amtrak's operations.

C. Constitutionality of § 402(d).

B&M argues that § 402(d) is unconstitutional. B&M contends that: (1) the irrebuttable presumption of need, regardless of actual need, violates the procedural due process requirement of the Fifth Amendment because the opposing party is foreclosed from receiving a meaningful hearing; (2) by allowing Amtrak to determine in its absolute discretion whether property of another railroad is required for intercity passenger service, § 402(d) unconstitutionally delegates legislative fact-finding authority to Amtrak con-

ferring upon it the power to control and dispose of individual rights to property without any guidelines restricting Amtrak's power; and (3) Amtrak's proposed taking of the Conn River Line for immediate conveyance to CV violates the "public purpose" requirement of the Fifth Amendment. B&M argues that it finds no public purpose because this line is not necessary for rail passenger service, Amtrak does not want to own the line, it only wants to transfer the line to CV, and Amtrak can achieve its goal without divesting B&M's ownershp.

As we have stated in *San Antonio, TX v. Burlington Northern Inc.*, 1 I.C.C.2d 561 (1986), it it not within the Commission's province to determine whether a particular statute is unconstitutional. Our function is to interpret the law as it is enacted and to enforce it as intended by Congress. We will therefore refrain from addressing B&M's constitutional arguments. If any party wishes to challenge the constitutionality of § 402(d) of RPSA, they should bring an action in an appropriate district court. 28 U.S.C. 1331, 1337. *See State of Texas v. United States*, 730 F.2d 409, 419 n.42 (5th Cir. 1984), amended on rehearing, 749 F.2d 1144 (5th Cir. 1985); *State of Texas v. United States*, 730 F.2d 339 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 267 (1984). We note that in any event most of the arguments B&M has raised here were raised and rejected in *Metropolitan Transportation Authority v. I.C.C.*, 792 F.2d 287 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 669 (1986).

Furthermore, by ordering the line conveyed to Amtrak as part of an overall transaction whereby Amtrak will ultimately convey the line to CV, we are not applying the statute in an unconstitutional manner. A secondary conveyance related to Amtrak's exercise of its eminent domain powers has already been judicially approved. *See National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir. 1987), *aff'd sub nom. Hagar v. National Railroad Passenger Corp.*, ___ U.S. ___, 108 S. Ct. 347 (1987). Here, Amtrak has established that its

interest in having the line conveyed is so that it may reinstitute its Montrealer passenger service--clearly a "public purpose."

D. Amtrak's need is established.

Section 402(d) states that the need of Amtrak for the property at issue shall be established unless the Commission finds both: (A) that the conveyance would significantly impair the railroad's ability to carry out its obligations as a common carrier; *and* (B) that Amtrak's obligations to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property).

B&M argues that Amtrak has an entirely feasible and even better route through Schenectady, NY, adding that Amtrak already operates on that line without any problems. This is not, Amtrak claims, an alternative route for the Montrealer as it is already used as an Amtrak route for the Adirondack train service. The operation of another passenger train over this line would not meet Amtrak's expressed need—to provide passenger train service from New York through Connecticut, Massachusetts, Vermont, and New Hampshire to Montreal, thereby servicing certain areas along that route currently without any passenger train service.

Furthermore, B&M argues that there is no valid reason to insist upon operating through Vermont and that the alleged need for service through Vermont is exaggerated. B&M points out past low rail ridership, adequate bus service and no Congressional mandate for passenger rail service through Vermont. These points are irrelevant to this proceeding as Congress has given Amtrak the authority to determine the necessity to restore the Montrealer through Vermont. *See Supplemental Appropriations Act*, 1987, Pub. L. No. 100-71, 101 Stat. 391, where Congress has specifically appropriated some $5 million so that Am-

trak could resume the Montrealer service between Springfield, MA and Montreal, Canada through Vermont.

Amtrak states that it considered two alternative routes through Vermont, but disqualified both of them. In its final brief, VT explains that these potential routes would require rehabilitation expenditures far beyond the funding sources available to Amtrak or itself to sustain any sort of passenger service. B&M does not dispute this analysis. We therefore find that there is no adequate alternative property available for Amtrak to acquire the Montrealer service.

B&M must meet both criteria above to rebut the presumption of Amtrak's need for the property at issue and has already failed to prove criterion (B). It has also failed to meet criterion (A), regarding significant impairment of B&M's common carrier operations resulting from the conveyance. B&M is receiving just compensation for the property being conveyed and has the option of retaining its local traffic through a trackage rights agreement. Its ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired. Accordingly, we find that Amtrak has established its need under § 402(d) to warrant conveyance of the Conn River Line for the restoration of the Montrealer passenger service.

II. JUST COMPENSATION

In this proceeding, we are asked to fix just and reasonable compensation to B&M, pursuant to § 402(d) of the RPSA, for the Conn River Line and certain other property interests belonging to B&M ordered to be conveyed to Amtrak for the restoration of the Montrealer passenger service over the line. No express guidelines govern the Commission's fixing of "just and reasonable" compensation. Parties recognize, as stated by both Amtrak and B&M, that just compensation is not determined by reference to fixed or inflexible rules, but rather by application

of valuation principles suited to the particular circumstances. Both Amtrak and B&M recognize that fair market value (FMV) is the standard by which just compensation is generally determined.

Parties have proposed several valuation methodologies and estimates of FMV. These methodologies include Original Cost Less Depreciation (OCLD), Replacement Cost New Less Depreciation (RCNLD), Comparable Sales (CS), Going Concern Value (GCV), and Net Liquidation Value (NLV). B&M argues that OCLD is the most appropriate methodology and submits an OCLD of approximately $10.2 million, which it claims is equivalent to its book value for the line. B&M further argues that a $5.7 million NLV is the minimum amount of just compensation constitutionally required. On the other hand, Amtrak, supported by MA and VT, argues that GCV is the most appropriate methodology and submits an estimated GCV of $531,122. Discussions of the various methodologies, positions of the parties, and our analysis follows.

A. Explanation of Methodologies.

1. *Original Cost Less Depreciation.* B&M argues that OCLD is the most appropriate method of determining just compensation and submits that the OCLD of the subject line is its book value, which it claims is $10.2 million. Under this approach, B&M states that the FMV is determined by increasing the original cost of the property by capital improvements and deducting depreciation and any physical deterioration. MA likewise states that OCLD includes the installation cost less depreciation of all capitalized improvements, and that OCLD is sometimes referred to as "net investment." MA adds that OCLD measures the asset base of the facilities on the rail carrier's book for regulatory purposes in establishing revenue adequacy and that OCLD should be used as the maximum upper limit. Although MA contends that OCLD is generally

the most appropriate methodology, it states the GCV as advocated by Amtrak would be most appropriate here.

Amtrak did not address OCLD in its initial arguments and evidence; however, Amtrak has submitted rebuttal argument stating that OCLD is generally not appropriate as a measure of just compensation. B&M argues that OCLD is used most often when: (1) parties disagree dramatically with regard to the property's FMV; or (2) the use of the market value asserted by the condemnor would be unjust. Here, B&M contends that the parties disagree dramatically as to market value, and the GCV proposed by Amtrak is unconscionably low, and therefore this is a situation where OCLD would be most appropriate.

B&M relies on factual similarities of two cases, *Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457 (1967), *cert. denied*, 390 U.S. 1002 (1968) (*Hudson Tubes*) and *In the Matter of the Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 445 F. Supp. 994 (Special Court 1977) (*Valuation Proceedings*). Both Amtrak and VT distinguish these cases from the present situation. In *Hudson Tubes*, Amtrak points out that the alternative method produced no value at all while, here, probative evidence has shown an alternative method will result in a meaningful award. VT points out that B&M contends its operations on the Conn River Line has provided marginal results similar to the situation of the owner in *Hudson Tubes* and the bankrupt transferors in *Valuation Proceedings*, but when arguing about GCV, B&M contradicts itself by agreeing with Amtrak that B&M is profitable and even contends that Amtrak has grossly underestimated GCV. In *Valuation Proceedings*, Amtrak and VT point out that the court does not adopt OCLD as a valuation method and in fact the court stated that "the parties should not read this discussion of original cost to indicate that we are bound to it as a factor in valuation* * * * We propose it only as a possible check on shortcomings we fear may develop in

the usual valuation method focusing on market values." VT further argues that B&M has misplaced reliance in these decisions which concerned the transfer of carriers' *entire interests* in railroad assets. VT argues that B&M improperly fails to account for the retention by B&M of an interest in the line and that distinction is crucial because OCLD measures the *entire net cost* of an interest in the railroad asset.

B&M also relies on *Amtrak and the Texas and Pacific Railway Co., Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 645 (1976). However, Amtrak points out that this case has been superseded. In 1976, the Commission determined in this case that just and reasonable compensation was equal to a rental charge based on original cost; however, as Amtrak points out, in 1978, Congress specifically amended § 402(a) to specify that the incremental cost standard would apply to the use of tracks and facilities of a railroad by Amtrak. This standard was upheld in *Metropolitan Transportation Authority v. I.C.C., supra*, as being consistent with the Fifth Amendment and, thus, superseding the Commission's 1976 decision.

Finally, B&M argues that, pursuant to the 1930 trackage rights agreement, CV is required to pay annually an amount equal to 3% of the book value of the entire line between Brattleboro and Windsor, which is currently assessed at approximately $10.2 million, and CV has continued to pay and it has charged rent on this basis without complaint for over 50 years. Both Amtrak and CV dispute the $10.2 million figure advanced by B&M and argue that this alleged present book value is unsupported and unwarranted as the OCLD because B&M fails to connect the 1930 stated value of the line of $6,065,170 with the present value of the line listed at $10,161,888. They also contend that the 1930 agreement fails to indicate that the $6,065,170 valuation is even based on OCLD. Amtrak further argues that $10.2 million figure has not been revised

upward or downward since 1983 and therefore plainly has not been subject to depreciation and that when a rail line like the line at issue has experienced physical deterioration beyond the point provided by normal depreciation allowance, further deduction for deterioration is required. *Valuation Proceedings*, 445 F. Supp. at 1030. MA also argues that B&M has provided no evidence correlating the 1930 value to the gross investment and accumulated depreciation value reported by B&M to the Commission in its Annual Report Form R-1, which B&M should have used to develop the OCLD. In fact, MA argues that the $10.2 million figure for the 48.8-mile segment is not credible as it would represent 17% of the entire B&M system with a calculated 1987 OCLD value of $60.5 million based on B&M's 1987 Annual Report Form R-1 data. MA states that B&M's 1987 average OCLD per mile ($45,180) multiplied by the 48.8 miles of the line at issue equals a maximum OCLD of $2,204,784 for the line at issue, which should be lower at the present time because of the current condition of the track and lack of recent investment in the line.

2. *Replacement Cost New Less Depreciation.* In its definition of RCNLD, which measures the cost of acquiring or rebuilding the rail property, less depreciation, MA explains that "replacement cost" is the cost of replacing the same facilities without accounting for technical change since the date of original construction and "replacement cost new" computes the cost of providing the same service using current technology. MA cautions that RCNLD may wrongly result in a measure of the possible value to the buyer rather than the amount necessary to indemnify the seller.

While B&M has not selected RCNLD as a method for this case, it argues that RCNLD should be taken into consideration when establishing FMV under a NLV approach to account for certain major assets like bridges and signals needed by CV to operate the line. Under the OCLD

approach these assets would be valued and B&M asserts it would be properly compensated, but not under a NLV approach in which these assets would be valued at zero because the salvage value would be offset by removal/ disposition costs. If these assets are not acquired by CV, B&M argues that CV would have to replace or build these needed bridges at a RCNLD of $6.3 million and signals at a RCNLD of $3 million. However, Amtrak contends that the addition of any value is simply unwarranted. Amtrak asserts that the signal system has no separately identifiable value and would either be accounted for or have no utility, and thus no value, in each of the valuation methods in the record.

Moreover, Amtrak argues that RCNLD is inapplicable in establishing a value for railroad lines condemned for continued operations. MA adds that RCNLD and OCLD are methodologies for asset valuation for regulatory purposes, such as determining revenue adequacy or a maximum reasonable rate. As with OCLD, MA states that RCNLD may be viewed as the maximum upper limit for just compensation.

3. *Comparable Sales.* The CS methodology, as explained by MA, seeks to appraise the property by imputing a price by reference to an arm's length sale (*i.e.*, not involving a taking by a public agency) of a similar property. However, MA states that CS is simply one method for estimating either GCV or NLV. Amtrak argues that CS is an inappropriate method of valuation because no two lines of railroads are identical and that there is no transaction sufficiently similar in geographic, commercial or physical attributes to the taking here proposed. Amtrak states that the use of the CS methodology requires: (1) sales shown to be reasonably similar to the subject property; and (2) adjustments as necessary to reflect differences between the circumstances and conditions of comparable sales and sales of the property being valued.

B&M contends that, if the difference between two sales are minimal or may be explained, evidence of one sale may be introduced on the question of the valuation of the other property. While arguing that CS is irrelevant here where valuation is for non-rail use, B&M also argues that comparable sales do exist. B&M points to a 1974 transaction in which Maine Central Railroad Company (MEC) solds its Mattawamkeag-Vanceboro line in Maine to CP who had trackage rights over the line and owned adjoining segments such as here. MEC also retained trackage rights over the line. B&M inflates the 1974 sales price to 1988 dollars resulting in a value of $190,000 per mile which values the 48.8-mile subject line at approximately $9.3 million. B&M also contends there are a number of comparable sales of lines of railroad in which the purchase prices ranged from $70,000 to $90,000 per mile and, if used to value the subject line, the FMV would range from $3.4 million to $4.4 million.

Amtrak argues that B&M's inflation of the sales price is unsupported by the record and that it contradicts B&M's table showing no upward trend in per-mile prices during the period of the sales. Furthermore, Amtrak and VT argue that B&M failed to show that the sales are comparable. Amtrak points to numerous factors relevant to comparability that B&M failed to mention regarding the 1974 MEC-CP sale. VT contends that the vintage of the 1974 sale and the many changes occurring over time to competitive factors that affect the railroad industry undermine the claim that the sale is comparable. VT further argues that B&M failed to restrict all of its comparisons to sales where the seller retained trackage rights or other substantial interests.

Amtrak argues that B&M has simply dumped into the record the barest summary of a number of sales in a variety of places, times, and circumstances. Amtrak points out that B&M has failed to mention two subsequent sales by MEC, a 23-mile segment between Beecher Falls, VT

and North Stratford, NH, which sold for $310,000 ($13,748 per mile) and a 11-mile segment between Coos Junction, NH and Waumbek Junction, NH, which sold to B&M itself for $100,000 ($9,090 per mile). Amtrak contends that the characterizations of these segments appear to more closely resemble the Conn River Line and so their per-mile values should also.

4. *Going Concern Value.* Amtrak submits an estimated GCV of $531,122 and argues that GCV is the most appropriate general method to measure the just compensation to B&M for its property interests in the line at issue. Amtrak defines this income approach as constituting the net present value of the future stream of pre-tax earnings which logically can be associated with this segment of the Conn River Line. Amtrak states that to measure properly the effect of taking, it is appropriate to measure the change in the income stream occasioned by the loss of the interests, and therefore in this proceeding, Amtrak compares revenues and expenses *before* the taking with those which will be obtained *after* the taking. B&M argues that Amtrak's approach is inappropriate and unworkable and flawed with specific errors in valuation inputs; however, B&M submits that a correct application of Amtrak's approach would lead to a valuation of approximately $4.4 million.

B&M argues that Amtrak's "before and after" valuation approach is not the GCV method as used in eminent domain theory or as used by the Commission, but rather as used in valuing "partial" takings. B&M contends that here it is neither necessary nor useful to use such a method when an entire asset (such as a railway line) is taken and a partial interest in the asset (such as trackage rights and rights to fiber optics easements) is left with the condemnee, especially since each item taken or left is a separate asset capable of separate valuation. Even if separate valuations can be made, Amtrak points out that it is improper to estimate a property's value by adding up separate values for various components or elements of value under

eminent domain law. Furthermore, Amtrak, along with VT, argues that this case only involves a partial taking. Amtrak contends that a taking of B&M's entire system would not be authorized, since B&M's entire system is not required for intercity passenger service and therefore the "before and after" approach would be required. VT points out that B&M will retain trackage rights, the exclusive right to serve existing shipper facilities on the line, the exclusive right to interchange with the Claremont and Concord Railway at Claremont Junction, NH, both existing and future interests in fiber optics leases on the line, and thereby will surrender only part of its interest in the line.

Under the particular circumstances of this case, B&M argues that Amtrak's "before and after" valuation is inappropriate because B&M's starting value here would be a net loss, not income, that would result in B&M owing a debt to Amtrak instead of being compensated for the condemnation of all its property. Amtrak contends B&M's argument is irrelevant and that GCV is recognized as applicable where a business is losing money. B&M also argues that the sensitivity of Amtrak's methodology combined [illegible] the unpredictable income from the subject line will [illegible] ssure an extremely speculative GCV. Amtrak argu[illegible] all the valuation methods depend on subjective judgments and opinions, not just GCV.

5. *Net Liquidation Value.* B&M submits an estimated NLV of $5.7 million and argues that NLV is the minimum amount that is constitutionally required to be awarded to B&M for the Conn River Line. Under this approach, B&M states that the valuation of the property is made using the assumption that the property will no longer be used for rail purposes, but rather will be sold for its highest and best use. Amtrak made no estimate of NLV in its initial submission, but it submitted an estimated NLV of $1,504,930 in its reply. Amtrak, supported by MA and VT, argues that NLV is not an appropriate option here where non-rail use of the Conn River Line is prohibited by the

existence of CV's trackage rights. MA argues that NLV assumes the carrier can successfully abandon rail service.

In response, B&M argues that: (1) abandonment may be granted even if CV continues to operate; (2) B&M could terminate the trackage rights and the Commission could fix terms for CV's continued operations; and (3) B&M would be able to make a strong showing of entitlement to an abandonment. However, B&M maintains that under 49 U.S.C. 10910 no showing is required that an abandonment would be granted or would in fact be filed. Under § 10910, B&M contends that NLV becomes the minimum just compensation because the rail line is listed for abandonment by the owners. Moreover, B&M claims that, in Finance Docket No. 30893, *National Railroad Passenger Corporation—Conveyance of Conrail Line in Wayne County, MI (Wayne County)*, the Commission instructed the parties in that § 402(d) proceeding to be guided "with respect to evidence regarding compensation" by Commission decisions for sale of rail lines under 49 U.S.C. § 10905. B&M argues that § 10905 establishes a price not below FMV and FMV has been determined to be not less than NLV.

VT argues that B&M's assertion that 49 U.S.C. §§ 10905 and 10910 establish NLV as the minimum permissible compensation for sales of lines slated for abandonment or included in the "Feeder Line Program" is inapplicable to this proceeding. Those provisions are particularly irrelevant here VT claims because B&M is neither liquidating nor surrendering its entire interest in the line and, thus, NLV would overcompensate B&M who will retain trackage rights and other interests that otherwise would be extinguished if the line was liquidated. Furthermore, Amtrak contends that no Commission precedent requires the use of NLV and that the *Wayne County* case neither suggests nor requires a particular method.

B. The Appropriate Methodology.

Although the Supreme Court has not laid down fixed rules or prescribed methodologies for determining just compensation, "[f]air market value has normally been accepted as a just standard." *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950). From the condemnee's perspective,[11] the market value is the highest price he or she could obtain for the property. *United States v. Miller, supra*, and *New York, N.H. & H.R. Co., 1st Mtg. 4% B.C. v. United States*, 305 F. Supp. 1049, 1059 (1969).

Based on our examination of the evidence of record and the arguments of the parties in this proceeding, we reject OCLD, RCNLD, and CS as unacceptable methodologies for use here to determine just compensation. OCLD does not relate to the current market value of the line since original cost is not a reliable indication of the current worth of a business entity. Moreoever, B&M has failed to substantiate that its figure of $10.2 million is in fact the OCLD of the line and has not provided us with sufficient information to formulate a reliable restatement of the value of the line based on this methodology. Indeed, the record shows that the line is currently in a highly deteriorated condition indicating insufficient maintenance over the years, thus rendering the use of OCLD particularly inappropriate where the proponent has failed, as here, to make any adjustment for excess deterioration. For the same reasons, the RCNLD is not appropriate here. Additionally, no party has even attempted to value the line using RCNLD methodology. B&M has valued a few of its interests allegedly using this methodology and added those amounts to its figure for NLV. However, this mixing of methodologies has not been supported with sufficient evidence. Finally, with respect to CS, we find that the parties have failed to demonstrate that the line sales relied upon are in fact comparable to

[11] The property must be valued by the loss to the owner, not its value to the taker. *United States v. Miller*, 317 U.S. 369, 375 (1943).

the subject transaction. While the 1974 MEC-CP sale submitted by B&M superficially resembles the sale here, B&M has failed, *inter alia*, to show or even discuss: (1) the amount of real estate involved in the sale; (2) the volume of traffic on the line; (3) the physical condition of the line; (4) the terms of the trackage rights agreements predated and followed the sale; (5) whether CP has any unusual reason for continuing service over the line; and (6) whether the price paid was cash, and if not, the cash equivalent.

NLV and GCV, however, are both appropriate methodologies to use in this proceeding to arrive at a determination of just compensation for Amtrak's taking of the rail property here. The two principal, though not exclusive, competing uses for railroad lines are for liquidation and for continued rail operations. Where the most profitable use of the line is to scrap the rail and ties and sell the underlying realty, then the market value of the line is the NLV. But where the line is worth more if it is used for continued rail operations, then GCV is ordinarily considered to be the proper measure of market value (unless of course there is a more valuable use). Amtrak, and parties in support, contend that GCV is the appropriate method for valuing its taking, while B&M argues that NLV represents the constitutional minimum for the line. We conclude that the higher of the GCV or NLV constitutes just compensation here.

The Commission has consistently used NLV and/or GCV as standards for determining what would be a fair market value of rail lines that are being conveyed, not in the market, but by Commission order. In conjunction with abandonment cases, the Commission has interpreted the "fair market value" language of 49 U.S.C. 10905(f)(1)(c) to mean NLV or GCV, whichever is greater. *See* 49 CFR 1152.27(h)(6). Only rarely have carriers argued that GCV exceeds NLV, perhaps because the very purpose of filing the abandonment application is to redeploy underused assets in a more valuable use. Thus, liquidation, not contin-

ued rail service, is admitted by the carrier to be the highest use. We would expect that lines with GCV greater than NLV would be sold to other companies under § 10901 or 11343 rather than abandoned.

Consistent with condemnation principles generally, the Commission has refused to allow consideration of "hold-up value" in § 10905 sales. In one case, a railroad argued that its property was worth more in the hands of the beneficiary of the forced sale than it was worth as scrap. The Commission rejected that argument in *Chicago and North Western Transportation Co.—Abandonment Between Ringwood, IL and Geneva, WI*, 363 I.C.C. 956 (1981), and the court affirmed in *Chicago and North Western Transportation Co. v. United States*, 678 F.2d 665, 668-669 (1982).

But the court also made clear that a higher GCV would not be an appropriate standard unless there was a market for the line for continued rail use irrespective of the peculiar needs of the offeror, who was only able to make an offer for the property because of a subsidy by a local government. No applicant in an abandonment case has been able to demonstrate, to our knowledge, that GCV exceeds NLV, so that the NLV standard has been applied in all cases.

Under § 10910, the "Feeder Line" provision, Congress has specifically defined "constitutional minimum value" for lines taken under that provision as "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater * * *." Section 10910 is more closely analogous to § 402(d) than is § 10905 because it allows the taking of *any* line of railroad, not just those lines slated for abandonment, as Amtrak contends. Section 10910(a)(2)(B).

This is a case of first impression. The Commission has not adopted a single standard for § 402(d) takings and we do not believe it would be appropriate to do so. Although

it might be appropriate to use NLV as a floor, there may be cases where § 402(d) is used to take rail lines that would have substantial market value as going concerns. Thus, NLV would not be an accurate gauge of fair market value in those cases. Moreover, § 10905, pursuant to which NLV has been used exclusively to value takings in the past, covers a narrow class of cases, because it applies only to lines authorized for abandonment. However, § 10910, as previously mentioned, is closely analogous to § 402(d), because it can apply to all rail lines (active or slated for abandonment). That section contains a test, NLV or GCV whichever is higher, that we believe is analytically sound, and is the test we will adopt to determine just compensation in this proceeding.

Amtrak contends that the Commission may not lawfully apply an NLV standard to assess the value of this line because B&M could not abandon and liquidate it. Amtrak believes the existence of the trackage rights agreement between B&M and CV could be used to block B&M from abandoning this line indefinitely, even if GCV drops well below NLV. This argument proves too much because Congress itself has used NLV as a floor under § 10910, which applies to all lines of railroad, not just those slated for abandonment. Congress' interpretation of just compensation is presumptively a lawful one. Accordingly, we are clearly justified in applying the same standard under § 402(d) in a similar context.

Thus, we will set just compensation for Amtrak's taking here at NLV or GCV, whichever is higher.

C. Calculation of Net Liquidation Value.

NLV is derived from three components: 1) gross salvage value of track and materials on the line; (2) cost of removal of the track and materials; and 3) value of the real estate. B&M calculates the NLV to be $5,680,155 as follows:

Gross Salvage	
Relay rail and other track material (OTM)	$2,447,500
Relay road ties	475,040
Scrap rail and OTM	184,340
Scrap road ties	181,195
Total Gross Salvage	$3,288,075
Cost of Removal	907,920
Total Net Salvage	$2,380,155
Land at Current Cost	3,300,000
B&M's Net Liquidation Value	$5,680,155

Although Amtrak maintains that NLV is not an appropriate methodology, Amtrak has submitted an estimate for NLV of $1,504,930. In general, Amtrak's estimate of NLV is a modification and correction of the evidence submitted by B&M, and is as follows:

Gross salvage	
Relay rail and OTM	$1,379,180
Relay road ties	160,000
Reroller rail and OTM	651,000
Scrap rail and OTM	159,510
Scrap road ties	183,950
Total Gross Salvage	$2,533,640

Cost of Removal	
Rail and OTM	$678,720
Ties	301,520
Freight charges	212,070
Road crossing restoration	16,000
Total Cost to Recover	$1,208,310
Net Salvage Value—Track	$1,325,330
Net Salvage Value—Bridges	(103,600)
Net Salvage Value—Sig. & Comm.	(23,000)
Total Net Salvage	$1,198,730
Land at Current Cost	306,200
Amtrak's NLV	$1,504,930

While the parties agree that NLV is the net salvage value of track and materials (gross salvage value less the cost of removal) plus the FMV of the land for the property to be taken, substantial differences exist between B&M and Amtrak in their actual NLV calculations. As discussed below, these differences are due, in part, to B&M's erroneous assumption that real estate outside the right-of-way for the line is being acquired and also due to Amtrak's finding of flaws in B&M's calculations resulting in overstatements of the gross salvage and FMV of the land and understatement of the cost of removal. For the most part, Amtrak's corrections are warranted. Based on the evidence of record, we find the NLV of the property subject to the taking to be $1,843,600.

1. *Gross salvage*. Although B&M acknowledges CV owns Windsor Bridge (0.72 miles), Amtrak points out that B&M improperly included the 0.7 of a mile of CV-owned track in the valuation of B&M-owned track. Amtrack contends that B&M, by including this 0.7 of a mile in its NLV study, overstates both gross salvage and cost of removal by including assets already paid for and owned by CV. Using B&M's own prices, costs, and classifications, Amtrak calculates that B&M overstated gross salvage by $38,500,

cost of removal by $10,500, and net liquidation by $28,000 for this track. B&M improperly included this track segment, and we will, therefore, adopt Amtrak's restatement deleting value for this segment.

Amtrak also claims that B&M overstated rail and OTM values by failing to note that B&M's track charts did not agree with trackage actually on the ground. The impact of this disclosure was to include passing siding tracks across the West River Bridge that no longer existed. During field inspections, Amtrak noted that the bridge only carries a single track and that the passing siding track ends just south of the bridge. Amtrak contends that, because B&M failed to adjust the passing siding lengths shown on the track charts, B&M's passing siding inventory was overstated, which results in B&M's overstatement of its gross salvage by $55,000, cost of removal by $15,000, and net liquidation by $40,000. The record shows that Amtrak conducted a thorough field inspection as opposed to B&M's cursory inspection and reliance on records. Thus, we will also exclude this challenged trackage from valuation here.

Based on the three work sheets submitted by B&M during discovery, Amtrak contends that B&M's entire field inspection was apparently done in one day. According to Amtrak, B&M's inspection was also apparently done by a visual or "eyeball" inspection of conditions at sample locations rather than by making precise measurements of the physical conditions of rail and track at the sample locations. Amtrak explains that buyers of rail classified as fit or reusable for railroad use have stringent requirements that must be met by prospective sellers, and to classify the rail properly, the level of wear must be ascertained through detailed measurements of the sample rails. Amtrak states that its field inspections were made using that procedure and level of detail and required 4 man-days. Based on its inspection, Amtrak contests B&M's rail classifications. Amtrak contends that its rail measurements

support the conclusion that 3,577 gross tons of rail are suitable for classification as reroller rail, a classification neglected by B&M. The reroller rail classification falls between fit/reusable rail and scrap rail, and commands a lower price than fit/reusable rail, but a higher price than scrap rail. Based on a price of $140 per gross ton quoted in late May 1988 for reroller, Amtrak calculates the gross salvage value of the reroller rail to be $500,780.

Also, in its inspection, Amtrak conducted tie count samples during which evaluations and counts were made of ties for 13 rail lengths at each sample location. Amtrak's total count of ties is 177,430 as opposed to B&M's count of 168,900. Of these, B&M counts 59,380 for railroad reuse, 51,770 for scrap/landscape purposes, and 57,750 as defective with no value. From its analysis of ties, Amtrak contends that only 25,000 ties are in fact fit for reuse and 65,695 ties could be sold for landscape purposes. Amtrak states that there has been little maintenance done on the subject line in the last several years and that B&M's own witness described the condition of the ties on the line as being poor to fair. Amtrak concludes that it is unrealistic to expect a railroad as poorly maintained as the Conn River Line to have over 35% of its ties in good enough condition to be salable for railroad reuse as projected by B&M.

Again, Amtrak conducted a thorough, on-site inspection and used appropriate methodologies in restating the number and condition of ties and the classification and value of the rail. In contrast, B&M has relied on a one-day cursory inspection. We, therefore, adopt Amtrak's restatement.

2. *Cost of removal.* Amtrak contends that B&M has accounted only for the removal of the ties that could be sold, and not all the ties on the line, as contemplated in B&M's real estate appraisal. B&M assigns no removal cost to the 57,750 ties it classified as defective and none for the ad-

ditional 8,530 yard ties pointed out by Amtrak. Applying B&M's $2.60 removal cost, Amtrak calculates an additional $172,328 of removal costs; however, Amtrak states that B&M's $2.60 average removal cost should be revised down to $1.75, as the lesser figure is a more realistic cost in a situation where all the ties are being removed. Amtrak also contends that B&M failed to take into consideration the average 20% brokerage cost associated with disposing of the ties and therefore revised downward B&M's tie prices accordingly. Amtrak notes that B&M's tie price for landscape ties still appears high, but does not further reduce the price for those ties. We agree with these adjustments proposed by Amtrak and will adopt them. In its real estate valuation, B&M assumed removal of all ties. Also, a brokerage discount is appropriate here considering the magnitude of the undertaking.

Amtrak further revised the cost of removal by adding freight charges of $212,070 for the disposition of removed track property. Amtrak also adds an allowance of $1,000 per road crossing for restoration of road crossings after removal of tracks to a smooth, usable surface in accord with State standards. Amtrak contends that B&M fails to allow for the cost of restoring the road crossings and that a total of $16,000 for the restoration is a proper deduction from gross salvage. We agree that B&M erred by not including the cost for road crossing restoration and find Amtrak's proposed cost for that item reasonable and will adopt it in our restatement. However, we reject the freight charges proposed by Amtrak for removal of track components since the removal costs per mile are sufficient to cover these expenses.

3. *Net salvage.* Based on the adjustments described above, Amtrak calculates a gross salvage value of track and materials of $2,533,640 and cost to recover of $1,208,310, for a net salvage value for track of $1,325,330. Amtrak also calculates estimates for bridges and signal and communication systems (negative because removal cost

exceeds salvage value), which B&M does not include in its NLV.

B&M notes the existence of 16 steel bridges between Brattleboro and Windsor. B&M estimates that these contain 2,800 gross tons of steel having a scrap value of $238,000 and approximate removal cost of $236,000, thus producing a negligible positive net salvage value of $2,000. However, B&M states it does not include any estimate of salvage value for any bridges, buildings, signal material, ballast, or any property other than rail, OTM, and ties. Using B&M's estimated 2,800 gross tons of steel contained in the bridges and applying to it an estimated $122 average cost per ton to dismantle the bridges, cut up the steel, and transport it to market, Amtrak calculates a removal cost of $341,600, which is $103,600 higher than B&M's estimated gross salvage value $238,000 (*i.e.* a $103,600 loss to NLV). However, Amtrak has failed to substantiate this removal cost and we find the negative net salvage for bridges to be speculative and arbitrary and incapable of firm determination. Thus, we will reject Amtrak's restatement for this item.

Amtrak further contends that B&M's NLV is flawed by failing to consider the impact of valuing and removing the signal and communication system assets. Amtrak does not agree it is proper to value signal and communication equipment at $0 for net liquidation purposes. Based on B&M's work paper, which reflects the fact that costs to remove equipment would greatly exceed any scrap value, Amtrak calculates an additional $34,000 to B&M's gross salvage, $57,000 to cost of removal, with a resulting $23,000 loss in net liquidation. Amtrak contends that the $23,000 loss is a conservative figure since it doesn't include removal of the poles or crossarms in the B&M-owned sections. We agree that there will be a net loss from the removal of B&M's old signal and communication system assets and that Amtrak has properly restated B&M's salvage value to account for that loss.

4. *Land at current cost.* B&M's land appraisers included all of the land associated with the Conn River Line and concluded the following amounts would appropriately compensate B&M for the proposed taking:

ROW (rural)	487.38	acres	$974,760
ROW (in-town)	41.83		836,600
	529.21	acres	$1,811,360
Excess land (rural)	371.03	acres	$1,484,120
Excess land (in-town)	.62		12,400
	371.65	acres	$1,496,520
Total land	900.86	acres	$3,307,880

As revised and clarified in its rebuttal testimony, Amtrak intends to acquire only that property which is necessary for rail operations.[12] Amtrak states that it has no intention of taking any excess land. Based on its appraisal, Amtrak calculates that the subject line includes 908.62 acres owned by B&M, of which 281.38 acres are excess and unneeded for Amtrak's rail operations. Amtrak states that it needs only 627.24 acres consisting of the right-of-way and additional property necessary for slope rights and culvert protection, which Amtrak computes to have an estimated FMV of $306,200.

Moreover, Amtrak contends that B&M's land appraisers lack qualifications as appraisers of property similar to that at issue here and failed to meet recognized standards of appraisal practice. For instance, according to Amtrak, the record demonstrates that B&M's appraisal was completed without sufficient familiarity with the property and without any meaningful site-specific analysis and that B&M's appraisers have no appraisal experience in the area of the subject property. On the other hand, Amtrak contends that

[12] *See* our discussion, *infra*, of terms and conditions where we condition the § 402(d) conveyance accordingly.

its appraiser, who has spent 36 years in the area, conducted a very detailed analysis for valuing land in VT, and in accordance with prescribed appraisal principles, values the property in VT at no more than $142,200. B&M's land appraisers state that, on the NH side, several interruptions in the right-of-way are caused by land held with reverters to original grantors, and Amtrak claims that reverters and limitations on title also existed in VT right-of-way land which B&M apparently failed to account for. Amtrak's appraiser agrees with B&M's appraisers that the property in NH is almost totally rural in nature. Amtrak's appraiser based its estimate of $164,000 for the 324 acres of property in NH on his review of numerous comparable sales analyzed in NH, and the specific uses of the right-of-way property. Amtrak argues that B&M's appraisal ignores the necessary adjustments for title defects, as well as for property taxes, insurance, maintenance, security and legal expenses during the period of time necessary to dispose of the parcels. Amtrak's appraiser incorporated into his evaluations a discount of 11% for 2 years to the anticipated sale date and a broker's sales commission of 10%.

We reject B&M's appraisal and accept Amtrak's appraisal for purposes of determining the FMV of the real estate here. B&M, by its own admission, has included land subject to reversionary interests. B&M has failed to demonstrate that it has marketable title to this land so it must be excluded from our valuation. B&M, however, has failed to identify sufficiently this property, so we are unable to make the necessary modifications to its appraisal. The record does not indicate that Amtrak included any property subject to reverter interests in its appraisal. Furthermore, Amtrak's appraisal is based on far more extensive on-site investigation than B&M's and B&M has failed to include any adjustment for a sell-off period as has Amtrak, due to regulatory and other delay inherent in such action of this magnitude. Accordingly, we find that Amtrak has produced a reliable appraisal, consistent with reasonable ap-

praisal principles, and we will, therefore, adopt Amtrak's valuation of the real estate.

5. *Conclusion—Net Liquidation Value.* As explained above, we reject Amtrak's proposed freight charges for the removal of track components and Amtrak's cost for bridge removal. With those modifications, we find that, based on the evidence provided, Amtrak's corrections to B&M's NLV are the best evidence of record, are reasonable, and will be accepted here. Accordingly, we find the NLV of the property subject to the taking to be $1,843,600, as follows:

Total Gross Salvage	$2,533,640
Cost of Removal	
Rail and OTM	678,720
Ties	301,520
Crossing restoration	16,000
Total Cost of Removal	996,240
Net Salvage	1,537,400
Land*	306,200
Net Liquidation Value	$1,843,600

*The current cost of land is predicated upon a two year sell-off period.

D. Calculation of Going Concern Value.

GCV is usually defined as the value of a business based on the expected profits that the business will generate in the future, *i.e.*, the net present value (NPV) of future profits. Here, however, Amtrak reasons that the only compensation to which B&M is entitled is the NPV of the annual changes in net revenue as a result of Amtrak's taking of the line. The NPV of "taking changes" represents the amount of compensation that would make the B&M "whole" (or no better or worse off) after the taking as opposed to before the taking. For our purposes here, this "before and after" approach is an acceptable variation

of the usual definition of GCV. The loss of profits as a result of the loss of the line is a fair measure here of the contribution the line is currently making.

There is substantial disagreement between B&M and Amtrak relative to Amtrak's methodology and calculations. This disagreement is largely due to differences of opinion between the two parties concerning certain future cost savings and revenue losses that would be experienced by B&M as a result of the taking. The two parties' GCV presentations also differ in their construction. Amtrak breaks cost and revenue items into many individual categories (these are depicted in the table, *infra*). Since B&M contends that GCV is inappropriate for use in this case, its presentation essentially attempts to refute Amtrak's numbers rather than submitting different ones. Moreover, B&M includes actual dollar estimates for only a few of the categories used by Amtrak.

Amtrak contends that the effect of the taking for year 1 is a "loss" to B&M of $313,082. This, it claims, is the result of an increase in operating expenses (mostly from the loss of joint facility credits which now are paid by the CV) of $277,612, a $16,483 reduction in net revenue from on-line interchange traffic from the Green Mountain Railroad, and an $18,987 reduction in rent income. Losses of declining magnitude are forecast by Amtrak for years 2 through 5, while gains of relatively smaller magnitude are estimated for years 6 through 20. The NPV of the changes or compensation due to B&M is calculated by Amtrak to be $531,122.

The Amtrak GCV procedure examines incremental gains and losses that would result from the taking to determine the amount of necessary compensation. Amtrak provides data showing how each of various cost and revenue elements are affected by the taking during the first year. It also provides some estimates of what will occur during the subsequent nine years following the first one. The results

for years 11 through 20 are based on those for the tenth year and assume that these tenth year results will remain constant. For the fist year after the taking, Amtrak's numbers, as developed by its consultant, R. L. Banks, in its June 28, 1988 filing, are modified by accepting certain of the adjustments proposed by B&M. The discount rate used to develop the NPV is 11.6%—the 1987 railroad industry cost of capital rate developed in *Railroad Cost of Capital—1987*, 4 I.C.C.2d 621 (1988).

In our GCV analysis, we have considered CV's current $300,000 (approximately) per year trackage rights payment to B&M as income and the maintenance obligation as an expense. The evidence of record is insufficient to determine exactly what losses B&M would occur from the loss of all traffic moving over the line were it not to accept Amtrak's proposed trackage rights agreement or a negotiated agreement. Yet, to ensure just compensation for the taking under a GCV approach, we must include this aspect. The $75,000 annual charge incorporated by Amtrak in its trackage rights proposal whereby B&M would allegedly not lose any significant amount of this traffic is the best estimate of the impact on B&M. In view of the failure of the record to provide a complete estimate for losses B&M would incur from traffic lost due to the taking of its line, the $75,000 annual payment cap constitutes a reasonable, amortized surrogate representing the lost traffic to B&M. Amtrak contends that this is an underestimate of the value of the trackage rights granted back to B&M. If this is true, then B&M presumably will accept the trackage rights thereby limiting its loss to $75,000 per year. If, on the other hand, Amtrak is wrong, then B&M may turn down the trackage rights. In that case compensation based on Amtrak's $75,000 offer would be excessive. In neither case would B&M be harmed.

To implement this approach, we will require Amtrak to negotiate exclusive trackage rights with B&M at a figure no higher than the $75,000 here offered. Beyond this, the

terms of trackage rights that Amtrak/CV propose to give back to B&M (after CV acquires the property from Amtrak) are excluded from the compensation analysis. This is a separate transaction, and there is no basis on which to conclude that B&M would actually consummate the trackage rights or that the terms proposed are reasonable. Moreover, the proper focus of the compensation decision is upon the value of the property at the time it is taken. *Antoine v. United States*, 710 F.2d 477, 479-80 (8th Cir. 1983), quoting *United States v. Creek Nation*, 295 U.S. 103, 111 (1935). Our surrogate valuation of $75,000, as supplemented, allows us to meet this standard in determining GVC for the taking here.[13]

We have analyzed the evidence of record and have developed an estimated GVC for the lines Amtrak would acquire of $2,373,286. Our calculations to obtain this figure are as follows:

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[13] We are unaware that the ceiling on maintenance charges to B&M under the proposed trackage rights agreement may increase if traffic is substantially increased. However, Amtrak revised its trackage rights proposal to apply the $75,000 cap to traffic levels that moved over the line prior to the rerouting of certain D&H traffic. Thus, this cap should be an accurate reflection of all the traffic that moved over the line.

TABLE I

First Year Net Revenue Loss/Cost Improvements in Perpetuity

Changes in Net Revenues—Expenses	
Signals & Interlockers	(6,876)
Depreciation	(63,294)
Joint Facility Credit	334,577
Repair & Maint. (Other (*see* Table II)	
Total Way & Structures	264,407
Other Rents (Debit)	(3,827)
Transportation	
Engine Crews	(2,253)
Train Crews	(3,847)
Dispatching Trains	(5,240)
Fringe Benefits	(2,133)
Total Transportation	(13,473)
Property Taxes	(12,423)
Net Increase RW Operating Expenses	234,684
Changes in Net Revenue—Local/Interchange Revenue & Rent Income	
Freight Rev On-Line Interchange	75,265
Freight Op Exp On-Line Interchange	(58,782)
Net Rev From Opns On-Line Interch	16,483
Local Lost Traffic Revenue	23,334
Misc. Leases	18,987
Lost Revenues (Less Costs)	
	58,804
First Year Losses Requiring Compensation	
Increased Operating Expenses	234,684
Lost Revenues	58,804
Total	293,488

Computation of GCV	
NPV of Total First Year Losses Requiring Compensation in Perpetuity*	2,530,069
Add Back Dispatching (48,940 per year)	
NPV of Dispatching in Perpetuity	421,897
Subtract Maintenance Cost Savings	(578,680)
TOTAL NPV IN PERPETUITY	2,373,286

* Computed by dividing first year losses by the 1987 railroad industry cost of capital rate (11.6%).

TABLE II

Computation of Maintenance Cost Savings

Year	Revenue Foregone (Note 1)	New Payments (Note 2)	Cost Savings (Note 3)	Total	Present Value of Total
1	117,278	142,680	(217,029)	42,929	38,467
2	137,053	142,192	(253,623)	25,622	20,572
3	156,828	141,703	(290,217)	8,313	5,981
4	176,602	75,000	(326,812)	(75,209)	(48,486)
5	196,377	75,000	(363,406)	(92,029)	(53,162)
6	216,152	75,000	(400,000)	(108,848)	(56,342)
7	216,152	75,000	(400,000)	(108,848)	(50,486)
8	216,152	75,000	(400,000)	(108,848)	(45,238)
9	216,152	75,000	(400,000)	(108,848)	(40,536)
10	216,152	75,000	(400,000)	(108,848)	(36,323)
Sum of First 10 Years					(265,553)
Savings After Year 10 in Perpetuity at 11.6%					(313,127)
Sum of Savings					(578,680)

Note 1: Represents 54.038% of maintenance costs (shown as savings) that the CV would otherwise have paid to B&M. This percentage figure was developed by Amtrak.

Note 2: Represents what the B&M would pay for maintenance in connection with its use of the line if owned by the CV. Figures are from Amtrak.

Note 3: First year figure from Amtrak. Sixth year and later held constant at $400,000. Years 2 through 5 are extrapolations on a straight line basis between the year 1 and year 6 figures.

With one exception, we have not used either Amtrak's or B&M's data for years subsequent to the first year after the taking. Instead, we have assumed that later years are similar to the first year. It is generally difficult to project

such figures for even a 1 year *pro forma* period, let alone a 10 year one. Neither Amtrak nor B&M has provided sufficient justification for estimates of changes that would occur for the subsequent years. The exception that we have incorporated is an adjustment for maintenance costs, discussed in more detail later in this analysis. Consequently, all of our figures (including any B&M adjustments) except for maintenance costs are based exclusively on results for the first year after the taking. Our analysis of the various cost and revenue elements which are subjects of contention in the GCV presentation is set forth below.

1. *Track maintenance expense.* Amtrak contends that annual track maintenance expenses that B&M would avoid as the result of the taking would vary from slightly over $4,400 per track mile in the first year to $11,000 per track mile for years five and after. B&M, in its rebuttal, makes no statement to disclaim the figures for the first five years but does argue that the $11,000 per track mile (per year) figure for years six onward is overstated by $3,000, mainly because Amtrak has indicated elsewhere that the maintenance cost for CV would be about $400,000 per year to maintain the line at Class II standards (25 mph) after rehabilitation.

We have accepted B&M's argument relative to maintenance expenses being overstated and: (1) used $400,000 in lieu of $536,000 per year from years six onward since that is the figure submitted by Amtrak for CV; (2) adjusted annual cost savings by using a straight line extrapolation between the figure for year one and the figure of $400,000 for year six (the same method used by Amtrak in its calculations); (3) adjusted revenue foregone (CV's share of maintenance expense if B&M continued to operate the line); and (4) incorporated new payments that B&M would make for its share of maintenance expenses under the proposed trackage rights agreement. These changes result in a NPV of maintenance costs taken in perpetuity equal to a savings

to B&M of $578,680; *i.e.*, they reduce the GCV by that amount. *See* Table II above.

B&M also contends that some of these maintenance costs would be capitalized. To the extent that the book value of the line would increase through a specific capital program or the projected maintenance expenditures, the amount of rent payable by CV would increase correspondingly. Since B&M receives a rental payment from CV equivalent to 3% of the book value of the line, B&M argues it would lose 3% of the capitalized costs. B&M fails to elaborate on any specific capital program and fails to include any evidence that some portion of the projected maintenance expenditures would be capitalized. Amtrak contends that the projected annual maintenance expenditures would encompass the essential work to cure the many day-to-day routine defects arising on the property and, because none of the work is projected to be of a nature enduring more than a year, none of the maintenance expenditures is expected to be capitalized. We agree with Amtrak's analysis that these maintenance costs would be expensed rather than capitalized and therefore find no projected lost rental payments and make no adjustment for such in the NPV.

2. *Dispatching expenses.* Amtrak contends that annual dispatching expenses could be reduced by $48,940, the cost of one dispatching position, if B&M no longer has this line segment. With transfer of dispatching control to CV, Amtrak argues that it appears reasonable that reassignment of B&M dispatching duties after transfer would allow reduction of five dispatching shifts per week (one position). Amtrak argues that since B&M consolidates its dispatchers at North Billerica, MA, there "surely [are] enough [dispatchers] to allow consolidation." B&M maintains that not even one position can be consolidated through workforce redeployment. B&M argues that no savings will be realized since it will operate more trips on the line than the single round trip postulated by Amtrak.

Amtrak fails to justify the elimination of a dispatcher. The elimination of ownership of one 48.8 mile segment while possibly still operating trains over that segment as the result of trackage rights is not justification for the elimination of a dispatcher. We support B&M's position relative to this issue and add back the annual cost of that dispatcher ($48,940) in perpetuity at 11.6%, resulting in an addition to the NPV of the GCV of $421,890.

3. *Traffic losses.* B&M contends that it would lose approximately 1,000 carloads of traffic per year with an annual gross revenue to B&M of $700,000 as a result of the taking due to the loss of local traffic from competition with CV. Amtrak contends that the modified trackage rights proposed to be given to B&M would preclude the loss of local traffic and that its modified proposal to permit B&M access, through reciprocal switching at reasonable rates, to new facilities which may locate on the segment would put B&M in a superior position after the taking vis-a-vis its present predicament.

We have discussed this matter in general terms *supra.* In addition to using the $75,000 figure to reflect lost traffic, CV will also now compete for some local traffic. The amount of these losses, however, should be relatively small, since B&M may choose trackage rights to maintain the carrying of local traffic and also have access to new facilities at reasonable reciprocal switching charges. To compensate for these particular losses, we have also used B&M's estimate of net revenue losses for year one ($23,334) and have computed the value of lost revenues by taking this figure at 11.6% in perpetuity, which produces an amount of $201,156 to be added to the GCV.

4. *Loss of control.* B&M contends that delays it would experience as a result of the loss of control of the line would result in substantial costs. B&M claims that it is difficult to quantify discrimination in train dispatching where it is necessary to delay one railroad's train or the

other's train because the variables are numerous and therefore challenges the figure presented by CV for the number of CV trains delayed by B&M trains allegedly due to discrimination. Yet, from this amount, B&M takes 25% to derive its own projected amount of loss ($94,200) due to discriminatory delays. B&M further claims that Amtrak has not addressed the issue of loss of train control.

Amtrak denies B&M's charges, arguing that increased line speed as a result of improved track conditions would more than offset any delays resulting from the taking. Amtrak argues that B&M seized upon this opportunity to generate invalid numbers and ignored the important explanations that the CV delays were due primarily to the slow track speed and that dispatching delays were primarily track caused. Amtrak therefore contends that, compared with the increased hours required to traverse the entire 48-mile line, the dispatching delays for CV trains are merely a small fraction of the 25% advocated by B&M and insignificant compared with over-the-road delays caused by slower track speed. As for the issue of loss of train control. Amtrak argues that it has not only addressed this issue but has also quantified the dollars involved with this loss of control and included this figure ($69,411) in its NPV estimate. B&M does not quantify the loss of line control.

B&M has merely chosen to take a 25% portion of the CV delay due to dispatching without any rational basis. We conclude that the savings to B&M that would result from improved track speeds could offset increased costs caused by any delays. Furthermore, we find that Amtrak has adequately factored B&M's loss of control into its annual cost figures. Finally, to the extent B&M accepts trackage rights and can show in the future that it has been discriminated against in dispatching, it has a separate remedy under the statute. We therefore make no adjustment to the GCV for loss of traffic control.

5. *Real estate sales.* B&M argues that the property included in the taking would contain certain parcels that are not necessary for railroad usage. B&M contends that there are 371.65 acres of land outside of the right-of-way with an aggregate value of approximately $1.5 million. B&M argues that it should be entitled to compensation for the loss of revenue that would result from not being able to sell this property. Amtrak claims that it is only taking that property which is necessary for rail operations (627.24 acres) and that all property in excess (281.38 acres) will remain in B&M ownership, so that no loss of sales revenues will result.[14] Amtrak contends that the 627.24 acres proposed to be taken consists of the right-of-way property and the additional property necessary for slope rights and culvert protection. After examining the evidence, we find that the evidence does not support a finding that B&M will suffer foregone real estate sales revenues of its excess, non-rail, right-of-way property along the Conn River Line since Amtrak is only taking that property necessary for rail operations, and we therefore make no adjustment to the GCV.

6. *Leases.* B&M indicates that it could sell additional easements for fiber optics over the next 10 years. It contends that the value of such future easement sales should be included in the computation of GCV. B&M also claims that, in addition to its fiber optics easements, revenues ($19,000 per year) from other routine pipe, wire, and property leases that would be foregone have not been included by Amtrak. B&M further contends that this revenue loss should increase in future years as use of real estate becomes more valuable.

Amtrak contends that it already has added B&M's revenue loss in property income each year in the NPV calculation advanced in its Second Supplemental Verified

[14] *See* our discussion, *infra*, of terms and conditions where we condition the § 402(d) conveyance accordingly.

Statement on Just Compensation. Amtrak also states that, in addition to excluding from the taking any residual interests in existing fiber optics leases, it will exclude from the interests acquired any future fiber optics leases that would not be inconsistent with rail operations over the right-of-way being acquired. As a condition to exercising these rights, Amtrak states that B&M is to be responsible for any costs, including those associated with delay or disruption in rail passenger or freight operations, caused by the installation or maintenance of these fiber optics cables. Since the value of existing non-fiber optics leases has been considered in Amtrak's calculations and B&M will retain the rights to existing and future fiber optics leases, we find there is no need for any additional compensation concerning leases.[15] We therefore make no adjustment to the GCV.

7. *Residual value of land.* B&M contends that, at the end of the 20-year term proposed by Amtrak, the real property in the Conn River Line would still have residual value which, when adjusted to present value, would equal at least the present value of the same real property. B&M contends that Amtrak's figures provide no residual value for the land underlying the rail and that a residual value should be assigned, discounted back, and added to the NPV of the taking.

Amtrak contends there is no reason to believe that rail use will cease after 20 years, and that it is inappropriate to assign a residual value under the circumstances. Amtrak argues that B&M provides no evidence that the continued rail use of the Conn River Line by B&M will expire in 20 years and, therefore, provides no reason to derive any residual value at an arbitrary point in time. Furthermore, Amtrak asserts that the 20-year maintenance and operating contract proposed between Amtrak and CV has no relevance to this issue.

[15] *See* our discussion, *infra*, of terms and conditions where we condition the § 402(d) conveyance accordingly.

Because we find no evidence that continued rail use will expire over the subject line in 20 years, we find it inappropriate to assign any residual value at this time. Our calculations assume that the land will continue to be used for rail purposes in perpetuity. Thus, we make no adjustment for residual value to the GCV.

E. Conclusion—just compensation.

We have found that the NLV of the property subject to the taking by Amtrak is $1,843,600. We have found the GCV of the line to be $2,373,286. Since GCV exceeds NLV here, we find that B&M is entitled to just compensation in the amount of $2,373,286 for the taking.

III. CV's PETITION FOR EXEMPTION

Having approved Amtrak's application under § 402(d) of RPSA, we now turn to the final stage of Amtrak's plan to resume its Montrealer passenger service over the Conn River Line—CV's related petition for exemption.

On April 7, 1988, CV filed a petition in the embraced proceeding (Finance Docket No. 31259) seeking an exemption under 49 U.S.C. § 10505 from the requirements of 49 U.S.C. §§ 11343-11345 and 49 C.F.R. Part 1180 to enable it to accomplish the following: (1) acquisition of all of the interests Amtrak is seeking to acquire from the B&M over the Brattleboro to Windsor portion of the Conn River Line, once Amtrak has obtained those interests under § 402(d) RPSA; and (2) conveyance of trackage rights over the line to B&M. (As to (2), we have concluded, *supra*, that the proposed trackage rights agreement will not be imposed by us but will be left to the parties to negotiate subject to the condition we imposed concerning Amtrak's $75,000 offer.)

As noted earlier, in a decision served July 5, 1988, in Finance Docket No. 31259, we gave the parties an op-

portunity to supplement the record on the competitive concerns raised in opposition to the exemption. On July 20, 1988, additional evidence on the competitive issues was filed in support of the exemption by CV[16] and VT[17] and in opposition to the exemption by B&M and CP. On July 25, 1988, replies to the additional evidence were filed by CV, Windsor, B&M and CP.

Under 49 U.S.C. § 11343, *et seq.*, a rail carrier may acquire and operate the rail property of another carrier only with the approval and authorization of the Commission. B&M and CP argue that this transaction should be subject to a full review under these statutory provisions. However, under 49 U.S.C. § 10505, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed acquisition under 49 U.S.C. § 11343, *et seq.* is not necessary to carry out the rail transportation policy. Exemption will promote the goals of effective competition found in § 10101a(4) and (5). B&M argues that the proposed transaction is contrary to these goals because it will adversely affect the competitive balance on the Conn River Line. Rather than a line of alternative ownership and mutual trackage rights, B&M

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[16] On July 21, 1988, CV filed a motion for leave to file one-day late the verified statement of N.R. Cutler in support of the petition for exemption. In the interest of a complete record and since no prejudice will result, we will grant the motion and accept the statement for filing.

[17] MA and Windsor informed the Commission that they would rely on their previous filings to address the competitive concerns, but reserved the right to file replies to the supplemental evidence on July 25, 1988, in accordance with the amended procedural schedule. NH filed a statement in support of granting the exemption.

submits that the entire line will be owned and controlled by CV (in essence CN), resulting in the gradual loss of B&M's traffic base, reduction of its service, and eventual exit from the market. According to B&M, the competitive situation is further exacerbated by the June 20, 1988 bankruptcy filing of D&H, which it argues effectively eliminated the only other north-south route between eastern Canada and the United States for its parent, Guilford.

In *Guilford Transp. Industries, Inc.—Control—D&H Ry. Co., 366 I.C.C. 396 (1982), aff'd in part and remanded in part sub nom., Central Vermont Railway, Inc. v. I.C.C.*, 711 F.2d 331 (D.C. Cir. 1983), we conducted an extensive competitive analysis, which we incorporate by reference here, of the four routes, including the Conn River Line, that compete for north-south traffic. There we found, among other things, that the traffic moving over the north-south lines is potentially subject to diversion to motor carriage. We also stated that the extent to which a carrier "controls" certain traffic depends on a number of factors and that both originating and bridge carriers can, by their rates, influence shipper choices. Ultimately, we found that the extent to which any rail carrier can exercise control over traffic is greatly diminished in the face of intense motor carrier competition and that, if rail carriers want to preserve traffic in these circumstances, they cannot afford to favor inefficient routes over efficient ones, even if it means that they will not preserve their longest possible haul. These findings are equally applicable today and we adopt them. Although CP may ultimately be inconvenienced by these transactions, it has not shown that competition or service to shippers will be harmed as a result. Thus, it has not shown that this consolidation will not be in the public interest. *See* 49 C.F.R. § 1180.1(a) (Merger Policy Statement).

We do not agree with B&M that the competitive situation need worsen as a result of this transaction. If B&M accepts trackage rights, it will continue to serve its ex-

isting shippers on the Conn River Line (even with the bankruptcy filing by D&H) and may obtain access to new shippers at new facilities via reciprocal switching to be performed by CV. Thus, the competitive situation on the line may continue as before with B&M retaining the exclusive right to serve its existing customers. The fact that B&M and CV will share in the right to solicit new traffic and that CV will have access to the Green Mountain Railroad is procompetitive and should serve to increase the available transportation options. Moreover, we agree with CV and its supporters that rehabilitation of the line will enhance B&M's as well as CV's ability to provide competitive service.

If B&M does not exercise its trackage rights option, then the shippers that are now served exclusively by B&M would be served by CV instead. This would not reduce the number of rail competitors, nor would it reduce the quality of competition. In fact, Amtrak and CV have agreed to make a substantial investment in upgrading the track which is desperately in need of maintenance.

We also agree with CV that its proposed acquisition will not preclude or fundamentally alter any existing interchange arrangements on any of the north-south rail routes in the Canada-U.S. markets, nor will it prevent any such arrangements which are now possible on these routes. Shippers and other carriers, including CP, will continue to have whatever options they now have to use either CV or B&M over the Conn River Line or the alternative north-south routes. Nothing about the exemption makes any of those options less available or attractive.

Finally, we disagree with CP's claim that exemption is inappropriate here because revocation is not a realistic possibility. *See* 49 U.S.C. § 10505(d). The revocation remedy remains available just as it is in other line sales.

The exemption will also expedite regulatory decisions consistent with § 10101a(2). There is a clearly established

need for expedited action in this case. CV must be able to begin work immediately on upgrading the line in order to complete the rehabilitation before the Fall frost. In addition, the $5 million appropriated by Congress for the purpose of rehabilitating this line is available only through September 30, 1988, the end of the fiscal year.

Rehabilitation of the line will also promote a safe and efficient rail transportation system [§ 10101a(3)] and enable the carriers to operate transportation equipment without detriment to the public health and safety [§ 10101a(8)]. The need for rehabilitation of the line has been clearly established by the record and, indeed, has received the imprimatur of Congress in its appropriation of the necessary funding.

Finally, exemption will further the goal of cooperation with the States on transportation matters [§ 10101a(9)]. This transaction is supported by Massachusetts; New Hampshire and Vermont.

Based upon the above findings, we also conclude that regulation is not required to protect shippers from market abuse. Competition from railroads and motor carriers available in the area precludes such abuse. Shippers in this proceeding unanimously support the transaction. Windsor's testimony is particularly compelling in demonstrating its need and desire for additional rail carrier options.

As discussed in the labor protection portion of this decision, we will impose the labor protective conditions in *New York Dock*, as a condition to granting this exemption. As a further condition, any employees affected by any grant of trackage rights to B&M will be protected pursuant to *Norfolk & Western*.

For the environmental and energy impacts of this exemption, *see* the environmental issues portion of this decision.

IV. LABOR PROTECTION

RLEA and UTU have requested labor protection for affected employees. RLEA submits that Amtrak's acquisition of the B&M's interest in the Conn River Line will result in the elimination at least 17 positions staffed by B&M agreement employees[18]—9 of clerical positions and 8 maintenance of way positions. RLEA states that B&M has also identified five operating craft employees whose positions could be adversely affected by the Amtrak acquisition. Based on the responses to its discovery requests, RLEA contends that Amtrak has taken the position that it will not make offers of employment to any B&M employees and will not agree to the application of the employee protective conditions set forth in *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979) (*New York Dock*), for the benefit of B&M employees adversely affected by this proceeding. RLEA also contends that CV has acknowledged that application of the *New York Dock* protection to employees affected by CV's acquisition of the line from Amtrak is proper and that labor protection is also due to employees adversely affected by the proposed trackage rights agreement with B&M, but CV has not specified whether it will accept responsibility for meeting *New York Dock* obligations to B&M employees adversely affected by Amtrak's purchase of the line from B&M.

RLEA argues that Amtrak's purchase of the line from B&M is a discontinuance of rail passenger service as contemplated by § 405(a) of the RPSA, which RLEA contends contains terms intended by Congress to extend employee protective benefits to employees of railroads that ceased rail passenger service operations in any fashion. RLEA claims B&M has the obligation to provide the fair and

[18] *See* Finance Docket No. 30965, *et al.*, for a discussion of the current status of employees on this line.

equitable arrangements set forth in *New York Dock* to protect the interests of its employees affected by this discontinuance, but notes that CV has indicated a willingness to assume these B&M employee protection obligations, so any concern that B&M will be burdened by additional liabilities to its employees should be dispelled.

Alternatively, RLEA argues that Amtrak's application to the Commission is a transaction subject to 49 U.S.C. § 11343 and *New York Dock* conditions. RLEA contends that any argument by Amtrak that § 402(d) provides unique procedures that preempt any application of the Interstate Commerce Act (ICA) is incorrect because there is no express language in the RPSA exempting this proceeding from procedures contained in Chapter 113 of Subtitle IV of the ICA and so the Commission must attempt to reconcile the terms of § 402(d) with Chapter 113.

RLEA submits, overall, that the CV-Amtrak conveyance cannot be viewed in isolation to the Amtrak § 402(d) application and, therefore, employee protective benefits should be applied to all B&M employees affected by this entire transaction. RLEA notes that the § 402(d) proceeding has presented a way for CV to obtain the line without engaging in direct negotiations with B&M, so the Commission must provide that the fair arrangement required by 49 U.S.C. § 11347, and by § 405 protect *all* rail employees affected by this sale, including B&M employees. RLEA contends that failure to provide employee protective benefits to those employees affected by this § 402(d) transaction would effect a taking of the property rights of B&M employees for a public purpose without just compensation and subject this sale to constitutional challenge.

CV has offered a proposed condition to the approval of its petition for exemption which addresses directly both RLEA's and B&M's concerns. CV states that it has increased its offer to hire certain B&M maintenance and signal employees who currently work on the Conn River

Line to encompass a total of five maintenance of way department employees described by RLEA. CV, however, contends that nothing about this transaction will affect those nine clerical employees and that any affect on any of these employees would be a unilateral decision by B&M for reasons unrelated to this transaction further to downgrade its service on the line or to otherwise reduce the frequency or volume of traffic moved over it. CV further disputes B&M's claim that five operating positions will be affected because B&M would ostensibly continue under trackage rights to serve existing shippers, and to provide local and overhead service on this line. Although no statute or regulation requires it, CV has offered to pay benefits equivalent to the dismissal, displacement, and separation allowances described in *New York Dock* to B&M employees affected by the conveyance of property from Amtrak to B&M and also to pay relocation expenses to B&M employees required to relocate to take a new position with CV as a result of this transaction, when the new position is more than 30 miles from their current residence. Based on its understanding of CV's offer, B&M states that its position is that B&M should be indemnified fully by CV for any and all potential labor related costs. Amtrak states that CV has offered to make these payments as a means of ameliorating any adverse impact which may occur as a result of the B&M-Amtrak transaction.

We need not address all of RLEA's arguments to resolve the matter before us and meet our statutory obligation to impose labor protection. In transactions such as this that are subject to 49 U.S.C. § 11343, we are required to impose *New York Dock* conditions. We see no need to analyze whether those conditions need also be imposed in the § 402(d) application. Imposing them in the related CV exemption will assure protection for all adversely affected B&M employees.

This does, however, create an issue of first impression. A sale between two rail carriers subject to *New York Dock*

typically results in the seller being responsible for labor protection for those in its employ who are adversely affected.[19] Certain aspects of this transaction preclude us from taking this approach here. First, there is no certainty that B&M will ultimately exercise trackage rights over the line. It has no legal obligation to do so. Thus, the extent of potential harm in B&M employees cannot be measured. Related to this is the fact B&M correctly notes that it should have no labor protection expense assigned to it. Were we to do so, we would be violating the precept of *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2149 (1985), that an exemption may not impose "regulation" on an unwilling party. Moreover, consistent with our takings analysis, *supra*, B&M would be entitled to full compensation were we to impose this obligation on it. As we cannot compute such an obligation, we would be adding considerable uncertainty and possibly delaying Amtrak's plans.

Moreover, this case is unlike a typical consolidation situation covered by *New York Dock*, where employees are protected as employees of a new system which is being formed. B&M will have no voice in the crewing over the property transferred. In the circumstances, there is no basis for the railroads and labor to negotiate an implementing agreement governing distribution of forces as a result of the transaction. Moreover, because this is not a voluntary transaction, there is no purpose to be served by requiring preconsummation negotiations of implementing agreements by each carrier with the affected employees. Each carrier shall negotiate an agreement subsequent to the transaction, with its employees, and each is responsible, at least in the first instance, for protecting its own employees. But we will require that CV be responsible for

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[19] The buyer may agree to assume this responsibility in the contract of sale.

all labor protection expenses, including indemnifying B&M for its expenses.

CV employees will be protected by any exercise of B&M trackage rights under the standard conditions of *Norfolk & Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980) (*Norfolk & Western*).

V. TERMS AND CONDITIONS

As previously described, § 402(d) empowers the Commission to order a conveyance of the B&M property interests to be acquired in this proceeding "on reasonable terms and conditions, including just compensation." In its initial application, Amtrak proposed the following terms and conditions: (1) the grant of trackage rights by CV to B&M to permit B&M to continue its rail operations without impairment: and (2) the requirement that B&M convey those interests upon a tender by Amtrak of its estimated just compensation. We will discuss these and other terms and conditions of subsequently proposed by Amtrak below.

1. *Trackage rights agreement.* In recognization of the Congressional concern expressed in § 402(d)(1)(A) regarding whether a conveyance would significantly impair the ability of the railroad being forced to make the conveyance of its line to continue to carry out its obligation as a common carrier, Amtrak has proposed that a grant of trackage rights from CV (the ultimate owner of the line under Amtrak's proposal) be imposed as a condition to the approval of its § 402(d) application. Over the course of this proceeding, Amtrak has attempted to fashion a trackage rights agreement that would result in B&M being no worse off competitively after the taking than before.

Under the agreement, B&M would have the right to continue to serve exclusively all existing shippers on the Conn River Line at the time of the transaction and any

new shippers that locate at existing facilities along the line (provided B&M maintained a minimum three day per week service along the line), and the exclusive right to interchange traffic at Claremont Junction, NH with the Claremont and Concord Railway. B&M may serve new shippers locating elsewhere on the line via reciprocal switching to be performed by CV at a rate of not more than 180% of the variable cost of providing such switching services. CV would have the right to serve new shippers locating at other than existing facilities now served by B&M and would have the right, along with B&M, now to interchange traffic at Bellows Falls, VT with the Green Mountain Railroad Corporation.

The trackage rights agreement is for a term of 20 years. However, if B&M defaults under the agreement, CV has the right to terminate and end B&M's use of the line. Also, under the agreement, CV has the right to abandon its operation over the Conn River Line by giving B&M 90 days' notice. Finally, the agreement provides that B&M will pay compensation for these rights in the form of an annual maintenance fee capped at $75,000 unless B&M's annual gross tonnage on the line exceeds 125% of B&M's 1985 traffic (*i.e.*, 26,072 carloads according to B&M). This year was finally chosen as being representative of B&M's future traffic levels, since traffic levels during 1986 and 1987 were depressed due to strikes and the diversion of CP overhead traffic to its affiliate, the D&H, which have now ceased.

Throughout the proceeding, B&M has maintained that it should be allowed to negotiate the terms of any trackage rights agreement to be imposed. B&M does agree, however, that if the § 402(d) application is approved, it must be granted trackage rights or its viability not only in that market but its entire system may be placed in jeopardy.

We find that Amtrak's offer of trackage rights is necessary to ensure, consistent with § 402(d)(1)(A) of RPSA,

that B&M's ability to carry out its common carrier obligations will not be significantly impaired, As we discussed earlier, the GCV that we have found to constitute just compensation to B&M is based on Amtrak's proposed grant of trackage rights under which B&M would be obligated to pay Amtrak an annual fee in the form of an annual maintenance fee subject to a $75,000 cap for the trackage rights. However, we conclude that it would be inappropriate to impose the exact terms of that trackage rights agreement on the parties without first allowing them the opportunity to negotiate. This is consistent with B&M's request to negotiate and with our long-standing policy of allowing the parties to agree on the specific terms of a trackage rights agreement whenever possible.

Parties may wish to adopt the proposed trackage rights agreement as is, or to negotiate different terms. As discussed earlier, Amtrak may not in these negotiations increase its demand for exclusive trackage rights to serve existing shippers at compensation of $75,000.[20] In effect, we are imposing this figure as an overall cap on what B&M may be required to pay. B&M may also refuse to enter into any trackage rights agreement. We will give the parties 20 days in which to negotiate terms and conditions for trackage rights. If the parties are unable to agree on terms at the end of the period allowed for negotiation, any party may request the Commission to set the terms and conditions for the trackage rights.

2. *Payment of estimated just compensation.* In our order finding that Amtrak is authorized to receive title, possession, and control of the Conn River Line, Amtrak has requested that we include a provision requiring B&M to convey its interests in the subject line to Amtrak upon a tender by Amtrak of its estimated just compensation to the Secretary of the Commission. This amount, plus any

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[20] As shown in Table II, the maximum would be $75,000 in years four and beyond but about $142,000 in years 1-3.

interest, would be disbursed to B&M, or other person or persons, upon demonstration that it (they) is (are) entitled to the money, including a demonstration that there are no outstanding liens against the property at the time of payment. This would allow Amtrak promptly to begin restoration of the line pending a final determination of just compensation. Since we are making a final determination of just compensation here, we need not impose the requested term. Also, we find no need to require B&M or others to demonstrate that there are no liens outstanding against the property because Amtrak is fully capable of determining marketability of title. However, we will provide for payment and transfer of the line in this fashion: upon Amtrak's tendering to B&M of the amount we have determined to constitute just compensation here, B&M is directed to convey its interests in the line. Amtrak will have 20 days from date of service of this decision to notify the Commission in writing as to whether it will purchase the subject property interests or withdraw its application.

3. *Interest and rights excluded from the taxing.* In its argument on just compensation, B&M enumerates six additional assets, interests or rights of B&M it claims are entitled to compensation—the potential for further development of fiber optics transmission cables, income from leases and other easements or licenses, the right to control the Conn River Line by means of dispatching, the signal system necessary for such dispatching, the passenger station at Bellows Falls, and the proceeds from sales of nonrail property located along the Conn River Line. As previously discussed, Amtrak is not taking B&M's rights and interests in future fiber optics leases nor any excess nonrail property owned by B&M along the segment which it could sell. B&M's income from leases and other easements or licenses has been accounted for in the valuation and the dispatching rights and signal systems are also treated by each methodology in reaching just compensation. As for the passenger station at Bellows Falls, B&M owns a

two-thirds interest and the State of Vermont owns the remaining one-third interest. B&M states that the station is presently used by both B&M and the Green Mountain Railroad Corporation, who has recently offered to purchase B&M's interest at FMV. Amtrak states that it can make alternative arrangements for a station in Bellows Falls, and would not want to deprive B&M of those revenues.

Amtrak therefore has proposed as part of its § 402(d) application to exclude certain assets and values in the Conn River Line, which are not necessary for Amtrak to achieve its objectives in this proceeding: (a) B&M's rights and interests in existing and future fiber optics leases not inconsistent with rail operation along the right-of-way being acquired under a condition that B&M shall be responsible for any costs, including those associated with delay or disruption in rail passenger or freight operations, caused by the installation or maintenance of fiber optics cables; (b) all of B&M's right, title and interest as tenant in common or otherwise, in the railroad passenger station at Bellows Falls, VT; and (c) those 281.38 acres of property described in Appendix B to the Verified Statement of Dennis Sullivan, filed on July 13, 1988, as being outside the right-of-way. Accordingly, we will impose appropriate conditions excluding these assets from the § 402(d) taking.

4. *Amtrak's obligation post transfer*. One last item must be addressed. Through the § 402(d) proceeding, Amtrak will purchase track that has been used for freight as well as passenger service. In so doing, Amtrak will acquire the underlying common carrier obligation to provide freight service. While Amtrak intends, in effect, to transfer this obligation and the track to CV, we remind it that the obligation remains if for some reason the Amtrak-CV transaction does not occur. In turn, when the property is transferred to CV, CV will have the common carrier responsibility to provide service over the entire line, unless B&M exercises its option for trackage rights to allow it exclusively to serve the points it is now serving.

ENVIRONMENTAL ISSUES

The environmental and energy impacts of the proposed transaction have been examined by the Commission's Section of Energy and Environment (SEE) and found not to be significant and no party has claimed otherwise. Applicants have identified a depot at Bellows Falls, VT, which they believe is the only structure 50 years old or older that will be acquired in the transaction as well as four other structures in the vicinity of the line to be acquired that they believe are not owned by B&M. The information required by 49 C.F.R. § 1105.7(c)(10) has been submitted to the State Historic Preservation Officers of both Vermont and New Hampshire for the Bellows Falls depot. However, since applicants did not have B&M's cooperation in identifying potential historic properties, they will be required to supply the appropriate State Historic Preservation Officer with the information specified in 49 C.F.R. § 1105.7(c)(10) for all additional properties 50 years old or older that are discovered once the transactions are consummated and to preserve intact all sites and structures 50 years old or older until the process required by § 106 of the National Historic Preservation Act is completed. SEE has prepared a written environmental assessment in this matter which may be obtained by contacting Harold Johnson [202-275-6874] of the Environmental Staff. We conclude that this action will not significantly affect either the quality of the human environment or energy conservation.

CHAIRMAN GRADISON, dissenting:

I have already made the argument, in my concurring statement in the Finance Docket No. 31256 decision, served July 5, 1988, that the second of the two transactions concerning which the CV has petitioned under 49 U.S.C. § 10505 (a proposed trackage rights agreement between CV and B&M to be imposed by the Commission) simply does not fall into the types of transactions for which an

exemption from the regulatory requirements of 49 U.S.C. §§ 11343-11345 is available. I will not repeat here the discussion I made there except to point out that ordering Amtrak and B&M to conduct negotiations for a twenty day period over what trackage rights, if any, B&M will be allowed to purchase in order to operate over its former property surely does not isolate and cure the intertwined nature of the subsequent Amtrak to CV transaction, which I believe runs afoul of the rule established in *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2149 (1985). It is clear that CV has the contractual right to stand in Amtrak's place in such dealings which, in any event, will not and could not have the slightest resemblance to the sort of actual market transactions which in certain cases are to be exempted from regulation.

There is, however, a more fundamental problem involved in this case. It can hardly be denied that the series of transactions proposed here constitute a great deal of overreaching on the part of Amtrak and CV. To label such conduct as merely "unattractive" corporate behavior would be surely to make a gross understatement. It would be one thing if Amtrak, assuming it wanted and needed the Conn River Line for intercity rail passenger service and having failed to come to an agreement with B&M for its acquisition, had merely invoked its limited rights of eminent domain granted to it by Congress and had instituted a proceeding under § 402(d) of the Rail Passenger Service Act ("RPSA"). Indeed, there is nothing in the present record that suggests that Amtrak is not entitled to an order from the Commission requiring a conveyance of whatever estate it needs in the subject property and fixing the reasonable terms and conditions therefor, including just compensation, as set out in the statute. I do not deny that Amtrak has met its burden of proof in this regard.

What I do object to is the attempt by Amtrak to restructure as between private, competing rail common carriers of freight that part of the ownership of the Conn River Line which it has admitted it does not need and does not want. The record is shockingly clear in this regard. It appears that CV has designs on the property of its competitor, B&M; Amtrak, although itself a private, nongovernmental entity, has been delegated certain limited eminent domain powers; Amtrak and CV strike a deal whereby Amtrak will not only take the estate it needs to operate intercity rail passenger service from B&M but, for good measure, will also seize the underlying fee and transfer it to CV; in exchange for this unique service CV has understandably agreed to underwrite the entire enterprise and has agreed in advance to an attractive 20-year tenancy in favor of Amtrak for that portion of the estate which is of actual use to Amtrak.

Since it is hard to imagine a more blatant misuse of the public's eminent domain power than for it to be employed for the personal enrichment of private interests, the salient question, artfully dodged and left unanswered by the majority, necessarily becomes: "Is this aforesaid outcome either mandated or permitted by the statute?" I conclude that it is not, and, further, that, in interpreting the statute to countenance the outcome sought by Amtrak and CV, the statute is being applied in an unconstitutional manner in violation of the Fifth Amendment's "public use" limitation on the exercise of the eminent domain power.

Amtrak has advanced, and the majority has acquiesced in, a different view, Amtrak argues that its secondary conveyance of the Conn River Line to CV involves the virtually identical question which the Second Circuit resolved in Amtrak's favor in *National R.R. Pass. Corp. v. Two Parcels of Land*, 822 F.2d 1261 (1987). There, Amtrak, under § 305(d) of the RPSA, successfully condemned a strip of nonrail property in New London, Connecticut, "required for intercity rail passenger service." The condemnation plan called for part of the property to be taken by Amtrak to be subsequently conveyed to the City of

New London for the construction of a public street or service road running parallel to the railroad right of way. While Amtrak reserved a permanent easement over this property for railroad inspection, maintenance, and repair, the city was to construct and maintain the new road. The court resolved the issue of whether or not the land required for the secondary conveyance could be condemned consistent with Amtrak's limited taking authority as follows:

> We see no impropriety in Amtrak's condemnation of property within the scheme of an overall cooperative agreement with New London and the FRA whereby the service road, the need for which is unchallenged, is maintained by New London. New London's grant of a permanent easement to Amtrak for inspection/maintenance purposes, the exercise of which may periodically close the road to the public, demonstrates the significant relationship between the condemned property and the provision of intercity rail passenger service. (*Id.* at p. 1265).

The question of whether a violation of the "public use" limitation of the taking clause did not arise in this case, and in fact the property owner, according to the court, did not dispute the right of Amtrak to condemn the property as a service road, only that it could not do so on behalf of the City of New London. (If New London had been required to condemn the property on its own behalf, the compensation issue would have been controlled by Connecticut law. Apparently this would have resulted in a larger award for the landowner.) In any event, it is well established in law that the condemnation of private property not in the public use in order to establish a public road does not violate the "public use" limitation. This longstanding rule was not at issue in this case.

Amtrak has asserted that the fact that the City of New London is a "public entity with eminent domain power"

and CV is a "public utility with similar power" and enjoys a "quasi-public status strengthens the conclusion that the taking of the Conn River Line and its transfer to CV thereafter, as proposed by Amtrak, would be in accord with the expressed purpose of § 402(d)." (Amtrak's "Application and Memorandum of Law," Vol. I, at 50-51.) Why this is so is not made clear, and, ultimately, Amtrak rests its entire argument concerning the validity of its secondary conveyance for the benefit of CV on the notion that the Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) has so vitiated the "public use" limitation that it is now no more than a generalized "public purpose" requirement. According to Amtrak, the scope of its eminent domain authority is as broad as its general public purpose: "Clearly, the condemnation power granted by Congress to Amtrak is predicated on a proper and reasonable public purpose: the promotion of continued rail passenger service in the United States." (Amtrak's *Application* at 52.)

Amtrak is so bold as to quote the Supreme Court holding in *Midkiff* as having application in this case: "[T]he Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Id.*, 467 U.S. at 241. But, as far as I can see, this analysis has absolutely nothing to do with the standards to be applied to determine and limit the extent of condemnation powers which have been delegated to Amtrak. As the Second Circuit squarely held in the New London case:

> Amtrak is not a "governmental body;" it is the creature of a statute which specifically provides that Amtrak shall not be an agency or establishment of the federal government. *Amtrak has not been authorized to exercise the sovereign's power of eminent domain.* It has been granted a limited power, within the meaning of *United States v. Carmack*, 329 U.S. 230, 67 S.

> Ct. 252, 91 L.Ed. 209 (1946), to condemn land "required [for] intercity rail passenger service." *Id.* 822 F.2d at 1264, 1265 (footnotes omitted, emphasis added).

As much as Amtrak might like to pass itself off as the equivalent of a state legislature or as the recipient of some generalized sort of plenary delegation of eminent domain power from Congress to go out and rearrange other people's property titles in accordance with what it calls its best "business judgment," the law has clearly and traditionally held otherwise in the cases of private corporations which for some special purpose have been delegated a limited condemnation power. Amtrak is not entitled to the deference which is accorded a state legislature or a government agency carrying out a statutory directive.

United States v. Carmack, 329 U.S. 230 (1947), cited above by the Second Circuit in its New London decision, states the distinction as follows:

> In the instant case, we deal with broad language employed to authorize [federal] officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers *except such as are excluded expressly or by necessary implication.* A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. *In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority. Id.*, 329 U.S. at p. 243, n.13 (emphasis added).

It is instructive to note that *Carmack* involved the question of whether federal officials under a broad grant of authority to condemn land for the erection of post offices and other public buildings could condemn land held by a city in trust for such public purposes as a local park or city hall. The Supreme Court held that it could, but it was careful to include the above quoted caveat. This brings us back to the point that Amtrak has raised about the fact that CV is, itself, a "public utility" with a "quasi-public status." What Amtrak fails to emphasize is that this is also the case with B&M. It is well established in the law that the operation of a railroad, as a common carrier, is a "public use," and there also exists long settled law as to how the eminent domain power relates in these and similar public utility cases. And this is the law that ought to be applied in this case, because it is clear that B&M's property known as the Conn River Line presently is in the "public use."

I believe the principles established in *West Bridge Co. v. Dix*, 6 How. 507 (1848), still control how Amtrak's limited condemnation power is to be construed, absent an expressly stated delegation of authority in the statute to the contrary. That case involved the question of whether a statute of the State of Vermont was in conflict with the U.S. Constitution's proscription against the impairment of contracts by the States. In 1795 the Vermont legislature had given the bridge company a 100 year corporate franchise to have the exclusive right to build a bridge and charge tolls over a four mile stretch of the West River. The amount of the tolls to be charged was subject to state regulation in a manner similar to present day public utility regulation. In 1839 Vermont passed a new statute and proceeded to condemn the previously granted franchise under its power of eminent domain in order to abolish the tolls and convert the bridge into part of a free public highway. Just as he had when he represented the Charles River Bridge Company eleven years previously and Dart-

mouth College before that, Daniel Webster relied on the contract clause in his contention that Vermont could not condemn what it had created by contract, but central to his argument was that the property had already been put to the public use and the state had no right to condemn it once more for the same purpose:

> [E]very turnpike, railroad, or toll-bridge, though made by a corporation, still is a highway, and an erection for public use; and therefore a clause in such grant to take private property, making compensation therefor, without consent of the owner, for such highway, is a legitimate exercise of the power of eminent domain. When, therefore, this power has been exercised, or the delegation of its exercise has been granted to the corporation and been used, and the private property been taken and devoted to the public use, the power has exhausted itself on the subject. All that remains is the contract of the State with the corporation, that is, that the erection shall be sustained by the corporation for public use, and compensation received therefor by the receipt of certain tolls. Now, can the State impair and abolish this contract by again exercising the power of eminent domain on the subject? *Id.*, brief for the plaintiffs in error, at 519.

The Supreme Court's answer was a qualified "yes." This could be done if, and only if, the property was needed for a new and greater public use. Three justices offered their opinion on the matter and the conclusion was clear on this score. Justice McLean addressed one of Webster's arguments as follows:

> It is argued, that, if the State may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not pretended. *Id.*, at 537.

Justice Woodbury made the same point in this manner:

> [W]hen, as in the present case, a free public use in a highway or bridge is substituted for a toll-bridge, and on a long and great and increasing line of public travel, and thus vests *both a new benefit and use, and a more enlarged one, in the public*, and not in any few stockholders, I have no doubt that these entitle that public for such a use to condemn private property, whether owned by an individual or a corporation. *Id.*, at 547.

The case stands for the proposition that the property of a private corporation which has been dedicated for the public use cannot be taken and vested in another private corporation of the same kind and for the same public use. In *Petition of Philadelphia, M. & S. St. Ry. Co.*, 53 Atl. 191 (Sup. Ct. of Pennsylvania, 1902), the court applied the principle to invalidate the taking of the property of one railway in order to transfer it to another where the court could find no public use in the taking because the property was to be put to the same public use as before. Justice Dean explained the rule in *West River Bridge* thusly:

> [T]he court assumes, that the franchise could not have been taken from one corporation for profit under the right of eminent domain in the state, and vested in another private corporation of the same kind for profit. The public use is made to depend on the fact that thereafter [the use of the bridge] was to be free. It was therefore not a transfer of the franchise and property of one corporation for profit to another of like character, but a taking for a purely public use.
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> It in effect decides that the growing necessities of a progressive age must be met by the exercise of the state's power of eminent domain. The public road appropriates the bridle path; the turnpike road, the pub-

lic road; the electric railway, the turnpike road; the steam railroad; the canal bed. *Id.*, at 193-194.

The court then proceeded to strike down as violative of the "public use" limitation on the taking power a legislative act by which one railroad was granted the authority to take the property of another. The court held:

> [T]he authority of the legislature to confer on a corporation the right to take the franchise and property of an older corporation for public use cannot be questioned. Whether it be expedient or wise for the legislature to exercise this authority to take property for public use is purely a political question, and one solely for the legislature. *But whether the use to which it is sought to appropriate the property authorized to be taken is a public use is a judicial question, for the determination of the courts. Id.*, p. 93.

• • •

> The effect, the only effect, of this fourteenth section and the amendment is to transfer the property of one private corporation to a new one for the same public use, both being transporters of passengers for profit. The transaction is not, in substance, different from the transfer of one farmer's land to his neighbor under some assumed right of eminent domain, which has not a shadow of warrant in the constitution. *Id.*, at 194.

One does not have to take the view that a modern day court would have struck down the statute in question to apply the court's reasoning in that case and others to the instant case. In today's world it may well be that if Congress had purported to have given Amtrak the express authority to condemn the property of one railroad and to transfer that property to a competing railroad and had recited a public purpose for doing so, a court would feel inclined not to strike it down, even if it were commonly

understood by all involved that the actual purpose of the taking was simply to take the property of A and give it to B.

The present case is surely different: (1) Amtrak is not a part of the government and is entitled to no such deference; (2) grants of taking power to corporations like Amtrak are limited to the power expressed or necessarily implied; (3) railroads in general do not have the power to take the property of another railroad absent an explicit and express legislative grant to do so (i.e., CV could not condemn the property of B&M), and such a legislative act would have to itself be consistent with the "public use" limitation of the Fifth Amendment; (4) the property that would be transferred to CV would continue to serve precisely the same public use as it does today; (5) even if the transfer of the B&M property to CV could be said to serve some greater public use (e.g., better or more efficient freight service, as some intervenors have admitted is their real interest in this case), Amtrak has no authority under its taking power to take property for such purposes.

I respectfully dissent.

It is ordered:

1. Under § 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. § 562(d), we find that Amtrak has sustained its burden of proof and established a need for the conveyance requested in its application, as revised. Amtrak has until August 1988, to notify the Commission in writing whether it will purchase the described railroad line and related interests from B&M or withdraw its application.

2. Just compensation for B&M's interests in the Connecticut River Line subject to Amtrak's taking under its § 402(d) application is established at $2,373,286. Upon Amtrak's tendering to B&M of this amount, B&M is directed to convey to Amtrak its interests in the line as described below:

(a) all rights, titles and interest in the rail right-of-way and structures, except as described in paragraph 3 of this Order, between a point where the CV-owned trackage at the north end of the Connecticut River Bridge in Windsor, Vermont terminates (approximately B&M MP 108.3) and a point where CV-owned trackage at Bridge Street in Brattleboro, Vermont (approximately B&M MP 60.1) commences;

(b) all rights, titles and interest in a spur track (known as the Brattleboro or West River spur) and right-of-way extending from the CV right-of-way to a line ten feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV-owned trackage;

(c) the right to dispatch operations over the trackage between White River Junction, Vermont and East Northfield, Massachusetts secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930 ("1930 Agreement") and other informal operating arrangements between CV and B&M;

(d) all rights, including those under the 1930 Agreement, to maintain and operate the segment of CV trackage between the point north of the Connecticut River Bridge where B&M-owned trackage terminates (approximately B&M MP 108.3) and a point adjacent to the passenger depot at Windsor, Vermont (approximately B&M MP 108.9) where CV-owned and maintained trackage commences; and

(e) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

3. This Order does not authorize Amtrak to receive title to, and possession and control of the following interests

in, and rights pertaining to that line of railroad in Vermont and New Hampshire known as the Connecticut River Line:

(a) B&M's interests in existing fiber optics leases, and the right to develop, arrange for installation under and receive revenues from, future fiber optics leases, all of which are expressly reserved to B&M; provided, however, that nothing in this Order shall be construed to permit B&M unreasonably to interfere with the operation of freight and passenger trains on this Line; and provided further that B&M or its employees, agents or contractors, during the installation of materials to implement fiber optics leases shall comply with rules and regulations of CV governing work on or near its right-of-way.

(b) All of B&M's right, title and interest as tenant in common or otherwise, in the railroad passenger station at Bellows Falls, VT.

(c) Those parcels of property described in Appendix B to the Verified Statement of Dennis Sullivan, filed in this proceeding on July 13, 1988, as being outside the right-of-way.

4. In Finance Docket No. 31250, we impose as terms and conditions of Amtrak's taking, pursuant to § 402(d) of RPSA, that trackage rights to allow it to continue to serve its existing shippers exclusively be granted to B&M and that the $75,000 offer is a payment ceiling. Parties have 20 days in which to negotiate terms and conditions for the trackage rights. If the parties are unable to agree on terms at the end of the period allowed for negotiation, any party may request the Commission to set the terms and conditions for the trackage rights provided that B&M is under no obligation to operate under trackage rights.

5. In Finance Docket No. 31259, under 49 U.S.C. § 10505, we exempt from the requirements of 49 U.S.C. § 11343, *et seq.*, the acquisition and operation by CV of the above-described railroad line and related interests of

Amtrak acquired by this § 402(d) proceeding, subject to the employee protective conditions in *New York Dock Ry.—Control—Brooklyn Eastern Distr.*, 360 I.C.C. 60 (1979), as modified herein, and for employees affected by the grant of trackage rights to the B&M, the protective conditions in *Norfolk & Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

We further require that CV be responsible for all labor protection expenses arising from both the transactions approved here.

6. Notice will be published in the *Federal Register* in Finance Docket No. 31259 on August 11, 1988.

7. Petitions for reconsideration in Finance Docket No. 31259 must be filed by August 31, 1988.

8. Applicants will be required to supply the appropriate State Historic Preservation Officer with the information specified in 49 C.F.R. § 1105.7(c)(10) for all properties 50 years old or older (other than the Bellows Falls depot) that are discovered once the transactions are consummated and to preserve intact all sites and structures 50 years old or older until the process required by §106 of the National Historic Preservation Act is completed.

9. B&M, ST, their parent company Guilford Transportation Industries, Inc., and any and all other persons in possession or control of the rights and interests described in paragraph 2 of this Order shall not interfere with or hinder Amtrak's or CV's possession or control thereof, and shall cooperate fully with Amtrak's or CV's possession and control thereof, including the dispatching of trains on the subject property by Amtrak or CV or their designee, and the entry of work crews thereon under the direction of Amtrak or CV or their designee.

10. This decision is effective on August 12, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Chairman Gradison dissented with a separate expression.

Vice Chairman Andre was absent and did not participate.

INTERSTATE COMMERCE COMMISSION

DECISION

NATIONAL RAILROAD PASSENGER CORPORATION - CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250

Decided: July 1, 1988

On April 26, 1988, we set out a procedural schedule which provided that on or about this date we would issue our determination of the need question.[1] Based on the evidentiary record developed on this issue, it is our decision that Amtrak has sustained its burden of proof and established a need for the conveyance requested.

Accordingly, we anticipate requiring conveyance as a part of our final decision in this matter. However, in the interim until final decision, the interests of the Boston & Maine are not altered, and therefore, its use and operations on the line are not here affected.

Further, in the absence of mutual agreement between the parties, we are prepared to determine and set the terms and conditions of compensation.

Therefore, we request that the parties proceed to submit their respective positions and arguments with respect to compensation in accordance with the set procedural schedule, in anticipation of our decision on or about August 8, 1988.

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[1] Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d).

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Sterrett, and Lamboley. Vice Chairman Andre dissented with a separate expression. Chairman Gradison dissented and will submit a separate expression at a later date.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN ANDRE, dissenting in part:

I would have found that AMTRAK may acquire only whatever minimum lesser interest in the property which is necessary for AMTRAK to accomplish its goal of service restoration. In other words, B&M should not be directed to convey its full property interest in the line. This approach has several advantages over the majority's insistence on a full transfer under section 402(d):

(1) First, the competitive issues raised by CP would be avoided since B&M would remain the only provider of freight service.

(2) Secondly, Finance Docket No. 31259 could be dismissed because there would be no need for a second transfer of the property and a conveyance of trackage rights back to B&M.

(3) Finally, B&M's just compensation award would be reduced due to the reduced property interest transferred to AMTRAK.

AMTRAK designed these transactions to avoid the problems inherent in full ownership of the line. AMTRAK is

no doubt less than eager to have to compensate B&M, or any other carrier, for acquiring full title to the line. Moreover, AMTRAK is neither able nor willing to provide freight service for the shippers on the line.

In order to avoid these problems, AMTRAK opted to acquire the entire property interest, sell it to CV, and arrange for trackage rights for existing freight service to be given back to B&M. This series of transactions is needlessly complex and is not required for AMTRAK to accomplish its goal of sufficient control over the property to effect service restoration. A partial transfer under section 402(d) would avoid competitive problems and still enable AMTRAK to avoid the problems that led it to propose these transactions.

AMTRAK has asserted that another reason for its proposed series of transactions is that it is reluctant to deal further with B&M's parent Guilford. However, as long as B&M continues to provide freight service on the line, AMTRAK will have to deal with Guilford directly or indirectly, regardless of whether formal title to the line is held by B&M or CV.

I also continue to believe that B&M is not being allowed sufficient opportunity to make its case on the valuation issue. See my separate expression to the decision served May 11, 1988.

INTERSTATE COMMERCE COMMISSION

DECISION

NATIONAL RAILROAD PASSENGER CORPORATION - CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250

CENTRAL VERMONT RAILWAY, INC. - PETITION FOR EXEMPTION - ACQUISITION AND OPERATION OF CERTAIN INTERESTS IN RAIL LINES FROM THE NATIONAL RAILROAD PASSENGER CORPORATION

Finance Docket No. 31259

Decided: May 19, 1988

By decision served April 29, 1988, we: (1) instituted this proceeding pursuant to an application filed by the National Railroad Passenger Corporation (Amtrak) under section 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(d); (2) consolidated it with a related petition for exemption filed by Central Vermont Railway, Inc. (CV) in Finance Docket No. 31259; (3) set forth a procedural schedule for the resolution of these matters; and (4) disposed of a number of pending procedural requests and petitions to intervene. By decision served May 11, 1988, we denied objections to the procedural schedule filed by the Boston and Maine Corporation (B&M), clarified the procedural schedule to provide that labor protection will be considered

as part of our determination of "just compensation" for the line, and granted additional petitions to intervene.

As discussed in our April 29th decision, Amtrak specifically requested in its application that the Commission order, pursuant to section 402(d), that a 48.8-mile segment of the line of railroad called the Connecticut River Line (located in the States of New Hampshire and Vermont), and certain other property and contract interests belonging to B&M, be conveyed to it and that the Commission establish the terms for the sale of the line. Amtrak has stated that conveyance of the 48.8-mile segment is necessary for it to resume its Montrealer passenger train service between Washington, DC and Montreal, Canada, previously provided over that segment of track. As part of its plan to restore this service, Amtrak states that it entered into a series of agreements with the CV for the future ownership and control of the line, for the prompt and efficient upgrading of the line, and for the operation of the Montrealer passenger service for a 20-year period. These agreements also provide that B&M will acquire trackage rights over the line upon CV's acquisition of the line from Amtrak. In the related Finance Docket No. 31259, to obtain Commission authority to implement these agreements, CV filed a petition for exemption: (1) to acquire Amtrak's interests in the line once Amtrak has obtained these interests; and (2) to grant trackage rights over the line to B&M.

On April 22, 1988, B&M filed a verified petition to convert Amtrak's application filed under section 402(d) to an application under section 402(a) of the RPSA.[1] In its

[1] Under section 402(a) of the RPSA, Amtrak may contract with railroads for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Commission is empowered to order the provision of services or the use of tracks or facilities of the railroad by Amtrak, upon application by Amtrak, if we find that doing so is

petition, B&M requests that the Commission consider the Amtrak application as if the application were filed under the provisions of section 402(a) instead of section 402(d). B&M claims that it shares Amtrak's desire to have the Montrealer passenger service resumed over its line and that since it is willing to enter into an operating agreement with Amtrak on reasonable terms and conditions, it is unnecessary for the Commission to compel B&M to convey the line which, under Amtrak's plan, would ultimately be conveyed to CV, a principal competitor. B&M contends that it has attempted in good faith to reach an agreement with Amtrak and that the primary obstacle to an agreement has been divergent views with respect to the appropriate method of sharing the cost to maintain the line at the standards which Amtrak desires. B&M states that it is willing to enter into an operating agreement with Amtrak providing for Amtrak to pay the additional cost to maintain the line at speeds set by Amtrak for passenger service. If the parties are unable to agree on the amount of such costs, B&M states it is willing to have the Commission make this determination, as contemplated by section 402(a). B&M concludes that treating the application undersection 402(a) offers the most straightforward and fastest method of achieving Amtrak's goal of reinstituting operation of the Montrealer. On May 5, 1988, Amtrak replied opposing B&M's request.

We will deny B&M's request that the proceeding be converted from one under section 402(d) to section 402(a). Under sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other

necessary to carry out the purposes of the RPSA. The Commission may also fix just and reasonable terms of compensation. Thus, section 402(a) merely empowers the Commission to order the provision of services or the use of the tracks of a railroad by Amtrak whereas section 402(d) empowers the Commission to order the actual conveyance of the line.

railroads. In each case, relief may be granted only upon application by Amtrak, and in each case different criteria, procedures, and standards apply. *See* 45 U.S.C. 562(a)-(d). Here, Amtrak has made an election of remedies by filing its application under section 402(d) for conveyance of the subject line, and has done so deliberately. Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service. Amtrak has not requested the Commission to consider alternative remedies in this case. As discussed in our April 29th decision, Amtrak has met the statutory criteria for the institution of a proceeding under section 402(d). Thus, Amtrak is plainly entitled under the statute to a decision on the requested conveyance of the line.

The State of New Hampshire has filed a petition to intervene in Finance Docket No. 31250. The State points out that, through its Department of Transportation, it administers a statutorily-mandated program to preserve, rebuild, modernize, maintain and operate railroads located within its geographic boundaries. According to New Hampshire, approximately one-half of the portion of the Connecticut River Line sought to be acquired by Amtrak is located within the State. Additionally, the Claremont and Concord Railway, a New Hampshire railroad, intersects with the subject line at Claremont Junction, NH, and the present owner of the line, B&M, provides freight service to businesses located in the State. New Hampshire concludes that its interests and those of its citizens will be directly affected by the Commission's disposition of Amtrak's application and, therefore, seeks leave to intervene.

New Hampshire has shown a sufficient interest in this proceeding and will be allowed to intervene. We are aware, however, that the time period for filing discovery requests has expired. To ensure a fair proceeding and complete record, we will allow the parties to serve discovery re-

quests on New Hampshire. These must be served within 3 days from the decided date of this decision. New Hampshire must respond to discovery requests on the issue of "need" for conveyance of the line within 5 days after the date it is served with a request on that issue. New Hampshire will adhere to the regular procedural schedule for responding to discovery requests on the issue of "just compensation" for the line. As New Hampshire has not sought to conduct discovery, we will not make a special provision for it to do so.

The Commonwealth of Massachusetts and the State of Vermont have each sought to intervene in Finance Docket No. 31259 in addition to Finance Docket No. 31250. Both have already been granted intervention in this proceeding by our April 29th decision, which consolidated Finance Docket Nos. 31250 and 31259. These additional petitions to intervene are, therefore, unnecessary and will be dismissed.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. B&M's petition to convert Amtrak's application under section 402(d) to an application under section 402(a) is denied.

2. The petitions to intervene in Finance Docket No. 31259 filed by the Commonwealth of Massachusetts and the State of Vermont are dismissed.

3. The petition to intervene by the State of New Hampshire is granted. Parties may serve New Hampshire with discovery requests. Such requests must be served within 3 days from the decided date of this decision, and New Hampshire must respond to discovery requests on the issue of "need" for conveyance of the line within 5 days after the date it is served with a request on that issue.

4. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

NATIONAL RAILROAD PASSENGER CORPORATION - CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250

Decided: April 26, 1988

On April 4, 1988, the National Railroad Passenger Corporation (Amtrak) petitioned the Commission to institute a proceeding under section 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(d).[1] By its petition,

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[1] Section 402(d) provides, in relevant part, as follows:

> (d) Disagreement procedures
>
> (1) If the Corporation and railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
>
> (A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and (B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the

Amtrak requests that the Commission order that a line of railroad and certain other property and contract interests belonging to Boston and Maine Corporation (B&M), a subsidiary of Guilford Transportation Industries, Inc. (Guilford), be conveyed to it and that the Commission establish the terms for the sale of the line. On April 7, 1988, Central Vermont Railway, Inc. (CV) filed a petition for exemption in Finance Docket No. 31259; (1) to acquire Amtrak's interests in the line once Amtrak has obtained these interests; and (2) to grant trackage rights over the line to B&M. Amtrak has filed a petition for document discovery. The Commonwealth of Massachusetts (Massachusetts) and the State of Vermont have each sought to intervene and have requested modifications to the procedural schedule proposed by Amtrak for processing its application. On behalf of the State of Connecticut, the Connecticut Department of Transportation (CDT) has sought intervention. Also, the Canadian Pacific, Ltd. (CP) has filed a petition to intervene and a motion to broaden the scope of the proceeding. B&M has asked us to reject the application and Amtrak has replied.

We will: (1) deny B&M's request to reject; (2) grant CP's, CDT's, Massachusetts', and Vermont's petitions to intervene and Amtrak's petition for document discovery; and (3) institute the requested proceeding. We will also require Amtrak to file with the Commission and serve on the parties certain additional information within 5 days of the service date of this decision. Finally, we will consolidate CV's petition for exemption with Amtrak's request for the section 402(d) proceeding.

Corporation by the exercise of its authority under section 545(d) of this title,

the need of the Corporation of the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

The subject line consists of a 48.8-mile segment of the line of railroad called the Connecticut or Conn River Line. The segment runs along the Connecticut River, starting at Brattleboro, VT (approximately milepost 60.1), crossing the river at Bellow Falls, VT (approximately milepost 83.8) into New Hampshire and crossing back to Vermont near Windsor, VT (approximately milepost 108.3), where this segment ends. Specifically, Amtrak seeks the following property or contract interests in the Conn River Line:

(a) all rights, titles and interests (with the exception of interests in existing fibre optics leases) in the rail right of way and structures between a point where the CV owned trackage at the north end of the Connecticut River Bridge in Windsor, Vermont terminates (approximately B&M milepost 108.3) and a point where CV-owned trackage at Bridge Street in Brattleboro, Vermont (approximately B&M milepost 60.1) commmences;

(b) All rights, titles and interests in a spur track (known as the Brattleboro or West River spur) and right of way extending from the CV right of way to a line ten feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV-owned trackage;

(c) the right to dispatch operations over the trackage between White River Junction, Vermont and East Northfield, Massachusetts secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930 (1930 Agreement) and other informal operating arrangements between CV and B&M;

(d) All rights, including those under the 1930 Agreement to maintain and operate the seg-

ment of CV trackage between the point north of the Connecticut River Bridge where B&M-owned trackage terminates (approximately B&M milepost 108.3) and a point adjacent to the passenger depot at Windsor, Vermont (approximately B&M milepost 108.9) where CV owned and maintained trackage commences; and

(e) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

Amtrak previously provided its Montrealer passenger train service between Washington, DC and Montreal, Canada over this segment of track. Amtrak states that it was compelled to discontinue this service in April 1987 due to the deterioration of B&M track segments along the route, including the segment Amtrak is seeking to acquire here. Amtrak states that it cannot reach an agreement with B&M for the resumption of this service and that B&M is considering discontinuance of rail service altogether on the line.[2] Thus, Amtrak has requested that the Commission institute a proceeding under section 402(d) for the forced conveyance of this line to it so that passenger service may be resumed over the line.

Amtrak states that on March 18, 1988, it entered into a series of Agreements with the CV for the future ownership and control of the line, for the prompt and efficient upgrading of the line, and for the operation of the Mon-

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[2] Pursuant to 49 CFR 1152.10, B&M designated this segment as a Category One line in September 1987. However, on March 25, 1988, B&M filed a revised System Diagram Map that deletes the Conn River Line from Category One and lists it in Category Five.

trealer passenger service for a 20-year period. These agreements also provide that B&M will acquire trackage rights over the line upon CV's acquisition of the line from Amtrak.[3] A copy of the proposed trackage rights agreement between CV and B&M has been included with Amtrak's application, but the other agreements have not.[4] Although Amtrak has indicated that it would release the agreements with CV during discovery, we believe the immediate filing of these agreements is necessary to assure that we have complete information before us in order that we, and all interested parties, have the opportunity to understand fully the involved transaction Amtrak is proposing here. Therefore, we will require Amtrak to file with us and serve on the parties to this proceeding copies of these agreements with CV and copies of its 1977 operating agreement with B&M under which it previously provided the Montrealer passenger service within 5 days.[5]

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[3] On page 3 of its application, Amtrak states that it "will retain operating rights on the line for the Montrealer and for B&M." Subsequently, at page 13 of its application, Amtrak clarifies the transaction by stating that, upon its acquisition of the property interests form B&M, "Amtrak will convey them to CV, which has agreed to grant B&M trackage rights permitting B&M to continue without interruption its present operations." The proposed trackage rights agreement shows the grant being from CV to B&M.

[4] The proposed trackage rights agreement provides that B&M will retain the sole right to serve shippers' facilities existing on the line as of the date of the conveyance as long as B&M maintains service of certain minimum levels. The right to serve new shippers or facilities that come on the line after that date will be reserved for CV. B&M will also be granted the right, along with CV, to interchange at Bellows Falls with the Green Mountain Railroad Corporation and the sole right to interchange with the Claremont and Concord Railway at Claremont Junction, NH. CV will acquire B&M's right to dispatch, maintain, and operate signals over the subject segment and over adjoining segments currently owned by CV.

[5] This information may be made the subject of a protective order agreed to by the parties, or at their request, imposed by the Commission, and filed under seal.

Additionally, Amtrak must file an environmental report and notify the appropriate State agency in VT and NH of the opportunity to submit information concerning the energy and environmental impact of the proposed action in accordance with 49 CFR 1105.11. Alternatively, Amtrak may explain why the provisions of the National Environmental Policy Act of 1969 and the provisions of the National Historic Preservation Act of 1966 are inapplicable here.

Amtrak states that this matter must be resolved expeditiously or it will not be able to resume the Montrealer passenger service this Fall as planned, but will have to wait until Spring of next year. In its Notice of Intention, filed March 23, 1988, Amtrak explains that prompt remedial action is imperative and requests expeditious action by the Commission.[6] Its concerns are that: (1) accelerating deterioration on the line is continuing; (2) limited funds appropriated by Congress for the reinstitution of the Montrealer may lapse or be redirected elsewhere; and (3) failure to complete the estimated 3-5 months of repairs before the ground freezes in the late Fall will delay the Montrealer service for another year. Moreover, under section 402(d)(2), Amtrak points out that the Commission is required to expedite such proceedings and issue its order within 120 days from the filing date of the application.[7] In view of this requirement and the reasons given by Amtrak, we will adopt a procedural schedule similar to the one proposed by Amtrak,[8] but somewhat more expedited to ensure that decisions on all aspects of these consolidated proceedings can be arrived at by the Commission within the 120 day time frame set forth in Section 402(d). It is set forth in the Appendix to this decision, and any requests for extensions of time will not be looked upon favorably.

[6] Windsor Minerals, Inc. filed a petition on April 1, 1988, in support of Amtrak's request for expedited procedure.

[7] Section 402(d)(2) of the Rail Passenger Service Act, 45 U.S.C. 562(d) states:

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

As requested by Amtrak, we propose to adopt a two track schedule. This will allow the Commission to issue separate decisions, (1) on the issue of whether an order establishing need for the conveyance of the line and requiring the conveyance is appropriate, and, if so, (2) on the issue of just compensation for the line. Additionally, we will consolidate with this proceeding CV's petition for exemption for its acquisition of the line from Amtrak and for its conveyance of trackage rights to B&M. CV's proposals are an essential part of the overall transaction here and, therefore, should be considered along with our determination of the issue of the need for the conveyance of the line to Amtrak. Moreover, this will facilitate our handling these matters on an expedited basis as requested by Amtrak and others and as mandated by law.

In its application, Amtrak states that the proper standard for compensation here is the going concern value of the line. It calculates this amount to be $506,000. Should the Commission decide that the value of the line exceeds this amount, Amtrak states that it must reserve the right not to follow through with the conveyance since its funds

[8] As discussed, *infra*, changes necessary to accommodate the participation of Massachusetts in this proceeding (and other interested parties beside Amtrak and B&M) have been made. Also, the schedule will provide that Government entities or other parties supporting Amtrak on the issue of its need for the line must file their evidence, arguments, or comments within 17 days after the service date of this decision. This will afford B&M an adequate opportunity to respond to those pleadings.

are limited. If the Commission orders conveyance prior to the final determination of just compensation, Amtrak further requests that the order provide that Amtrak may require conveyance by B&M upon a tender of Amtrak's estimated just compensation.

There are currently no Commission regulations to guide the parties in the submission of their evidence. The parties therefore should present all relevant information and supporting documents. The parties must fully explain whatever methodologies they use in determining just compensation for the line and any other terms and conditions of sale. In this regard, we will require Amtrak and parties in support of Amtrak to file supplemental evidence and argument on the issue of just compensation based on any information obtained through discovery prior to B&M's response on that issue. B&M will therefore be afforded the opportunity to respond to Amtrak's complete presentation on that issue. *See* Appendix.

In connection with its request for expedited handling of its application, Amtrak has filed a petition seeking waiver of 49 CFR 1114.30 requiring parties to obtain prior Commission approval to conduct document discovery. As part of this relief, Amtrak also seeks a Commission order directing the parties to respond promptly and fully to document production or inspection requests made by other parties to the proceeding. Amtrak argues that such action is necessary to avoid unnecessary delay by parties in producing documents critical to Amtrak's valuation of the Conn River Line and otherwise to the timely resolution of this proceeding. Amtrak states that the documents should be made available in Washington D.C. or at any other place deemed appropriate by the Commission pursuant to 49 CFR 1114.30(b). Amtrak concludes that parties would reserve the right under this procedure to request a protective order from any document request. B&M has opposed Amtrak's request on the grounds: (1) that Amtrak failed to verify its request as required by 49 CFR

1114.21(b)(2); (2) that it would be premature to grant the discovery at this time since Amtrak's application has not yet been accepted; and (3) that this discovery request would be inconsistent with Amtrak's request for discovery in its proposed procedural schedule included with its application.

We will grant Amtrak's discovery petition. Pursuant to 49 CFR 1114.21(b)(2), we may authorize parties to conduct document discovery under 49 CFR 1114.30 on our own motion and do so here. Thus, the failure of Amtrak to verify its petition is of no consequence. This action will facilitate the expeditious resolution of this proceeding as required by statute while still giving the parties the opportunity to conduct meaningful discovery within the time frames of the procedural schedule we are imposing here. In this fashion, Amtrak's discovery request will be consistent with both the procedural schedule it has proposed and the one we are adopting in this decision. The parties may determine among themselves where requested documents should be made available. We urge the parties to cooperate fully with each other in the timely resolution of all discovery requests, as dilatory tactics will not be tolerated.

On April 1, 1988, the Commonwealth of Massachusetts filed a petition for leave to intervene in this proceeding and submitted comments on Amtrak's proposed procedural schedule. It states that this proceeding will have unavoidable repercussions for Massachusetts since Amtrak will acquire certain B&M rights to dispatch trains operating in the Commonwealth and B&M rights to operate and maintain certain signals there. Also, Massachusetts points out that Amtrak's arrangements with CV may result in at least temporary rerouting of the Montrealer from its previous route through the Commonwealth, once service is resumed. Finally, Massachusetts points out that the resolution of the issues in this proceeding may affect the resolution of similar or identical issues in a future section 402(d) proceeding, that may be instituted with respect to

the Springfield-East Northfield, MA right-of-way, over which segment the Montrealer was also previously operated. Massachusetts has demonstrated a sufficient interest in this proceeding to warrant its intervention, and its petition to intervene will therefore be granted.[9]

On April 14, 1988, the State of Vermont (Vermont) also filed a petition for leave to intervene in this proceeding and submitted comments in support of Amtrak's proposed procedural schedule. It states that the Montrealer has carried thousands of passengers to and from Vermont prior to the deterioration of the Conn River Line. Approximately half of the mileage of the subject line lies in the State of Vermont, and according to Vermont, its shippers and other railroads operating there rely on the line for fast, efficient service. Vermont points out that B&M's failure to maintain

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[9] Massachusetts has also submitted comments on Amtrak's proposed procedural schedule and other procedural aspects related to the proposed proceeding. As discussed in footnote 8, we have revised Amtrak's proposed schedule to allow participation by Massachusetts and other interested parties in the requested proceeding. We have also amended the filing date for the parties supporting Amtrak on the issue of need so that B&M will be afforded an adequate opportunity to respond. *See* Appendix.

Massachusetts has recommended in its comments that B&M be required to declare whether it will challenge Amtrak's need for the line Amtrak is seeking to acquire under section 402(d) or whether B&M will merely contest the amount of compensation Amtrak proposes to pay for the line. In view of B&M's statement in opposition to the application, discussed *infra*, filed April 6, 1988, imposing such a requirement has now become moot.

We also reject as unnecessary Massachusetts' recommendation that we require the parties to use messenger, telecopy, or overnight courier service for all filings on all active parties. However, we admonish the parties to cooperate fully with each other with respect to the expeditious service of pleadings due to the short deadline that will apply here.

Finally, we will deny Massachusetts' request that an Administrative Law Judge be assigned to this proceeding. If at a later date an ALJ is needed, one will be assigned.

its segment of the Conn River Line has resulted in severe harm to Vermont rail passengers and freight shippers and that the success of many other railroads operating within the state is tied to the outcome of this proceeding. In particular, CV depends upon the Conn River Line as a necessary link in its north-south service, and both the Green Mountain Railroad and the Lamoille Valley Railroad depend directly on connections with the Conn River Line for access to shippers and receivers inside and outside of the state. Vermont has also demonstrated a sufficient interest in this proceeding to warrant its intervention, and its petition to intervene will therefore be granted.[10]

By pleading filed April 15, 1988, CDT has sought to intervene in this proceeding. CDT states that it is responsible for public transportation within the State of Connecticut and to other states in the area. As such, it is anxious to see the Montrealer passenger service restored and is also concerned with CV's movement of freight between New London, CT and northern New England and Canada. CDT has demonstrated sufficient interest in this proceeding and will be allowed to intervene.

On April 20, 1988, CP filed a petition to intervene in this proceeding and a motion to broaden the scope of the proceeding. CP points out that CV is a wholly-owned subsidiary of Canadian National Railways (CN). CP states that it has long conducted freight operations over the Conn River Line and actively competes with CV/CN in the international movement of rail freight over that line. CP states that it would be significantly affected by any change in ownership or operation of that line segment.

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[10] In its comments in support of the proposed procedural schedule, Vermont agrees with Massachusetts that B&M should be afforded the opportunity to respond to Government entities and other parties supporting Amtrak on the issue of need for the conveyance of the line. As discussed in footnote 8, we have incorporated this change into our procedural schedule.

We will grant CP's petition to intervene since CP has shown a sufficient interest. However, we need not grant CP's motion to "broaden the scope of this proceeding." As discussed *infra*, the parties may raise any relevant issue in this consolidated proceeding, and we will address those issues in our resolution of this case on the merits.

On April 6, 1988, B&M filed a statement in opposition to our acceptance of Amtrak's application. B&M argues that Amtrak's offer to purchase is a transparent attempt to meet the statutory criteria of section 402(d). B&M states that there has been no discussions with Amtrak for a sale other than a take-it-or-leave-it letter dated March 18, 1988, sent by Amtrak to B&M. According to B&M, Amtrak, therefore, has not met the statutory precondition for filing an application under section 402(d) that requires that the parties be "unable to agree upon terms of the sale." B&M concludes that it is simply premature at this time to know whether the parties will agree or will be unable to agree on the sale, so Amtrak's application should be rejected. We disagree. Amtrak has set forth a detailed history of its dealings and negotiations with B&M over the Conn River Line, and of its efforts to maintain passenger service over this line.[11] Amtrak made a valid offer to purchase[12]

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[11] For example, after discontinuing the Montrealer service, Amtrak states that it has attempted on several occasions to negotiate restoration of the line and has offered to purchase B&M's interest in the Conn River Line to no avail. In April 1987, Amtrak even invoked arbitration before the National Arbitration Panel to resolve the dispute. Amtrak obtained an order compelling arbitration in the U.S. District for the District of Columbia. B&M has appealed the order. Even if it prevails, Amtrak states that that proceeding offers no prospect for achieving reinstitution of the Montrealer passenger service. Moreover, Guilford and B&M terminated discussions with Amtrak on negotiating terms to upgrade the line and restore service even after Congress had appropriated $5 million for the restoration of the Montrealer passenger service. *See Supplemental Appropriations Act*, 1987, Pub.L.No. 100-71, 101 Stat. 391 447-48. The appropriation in and of itself demonstrates

and, in response, B&M stated by letter dated March 29, 1988 that there was "no need to pursue the very complex offer to purchase" and instead proposed negotiations for compensation to B&M to rehabilitate and maintain its line for Amtrak's passenger service. Nothing in this record provides any indication that Amtrak and B&M will ever reach agreement on terms of a sale. Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under section 402(d).

B&M also claims that CV, a direct competitor to B&M, is using Amtrak to acquire the Conn River Line because, in a past acquisition attempt, CV was unwilling to pay a fair price to purchase the line directly from B&M. B&M argues that the substance of the proposed transaction is the sale by B&M of a line of railroad to CV, which is a transaction the Commission must review under the terms of 49 U.S.C. 11343 and 11344. This issue is interrelated to the overall determination of whether Amtrak has demonstrated a "need", as required under section 402(d), to acquire ownership of the line here for providing intercity rail passenger service. We anticipate that this issue and any other issues of relevance raised by B&M will be addressed during the course of this proceeding during which time all parties will have the opportunity to submit evidence and argument. Indeed, as previously discussed, we are consolidating with this proceeding CV's petition for exemption from 49 U.S.C. 11343, *et seq.*, for the acquisition

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that there have been on-going negotiations over this line for a significant length of time.

[12] By letter dated March 18, 1988, Amtrak offered $1 million to purchase from B&M or Guilford their property or contract interests in the Conn River Line that are now the subject of this section 402(d) conveyance request. In connection with the sale, Amtrak also offered to grant B&M trackage rights over the acquired property for continuing its present freight operations.

and operation of the subject line and for its proposed trackage rights grant to B&M.

Finally, B&M argues that section 402(d) does not authorize the Commission to compel the conveyance of lines of railroad. However, contrary to B&M's characterization of the legislative history of section 402(d), we believe that Congress has clearly expressed its intent to sanction the acquisition of existing and operating lines of railroad by Amtrak under that provision based on the clear language of the statute. Prior to amendment of section 402(d) by the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210 (4R Act), the first sentence of the statute provided that Amtrak could apply to the Commission for conveyance of railroad property "required for the construction of tracks and other facilities necessary to provide intercity rail passenger service. . . ." The 4R Act repealed the limiting reference to construction, so the statute now covers any rail property "required for intercity rail passenger service. . . ." This is confirmed by the statement of the Senate Commerce Committee that the intent of the amendment was "to clarify that the powers [of eminent domain] granted by Congress [to Amtrak] in section 305 and 402 of the Rail Passenger Service Act may be used to acquire existing facilities without regard to whether or not construction of new tracks and facilities is involved." S. Rep. No. 499, 94th Cong., 1st Sess. 104 (1975). Moreover, had Congress not intended for Amtrak to have the power to acquire a line of another railroad, it would not have been necessary for it to limit Amtrak's acquisition power by precluding a forced conveyance where such conveyance "would significantly impair the ability of the railroad to carry out its obligations as a common carrier. . . ." *See* section 402(d)(1)(A). Finally, B&M's reliance on a restriction in Amtrak's parallel eminent domain authority under section 305(d) to acquire property interests from non-rail carriers is misplaced. Congress included language in that section precluding Amtrak from exercising its eminent domain authority to acquire property interests owned by a railroad merely to distinguish Amtrak's authority to acquire non-rail owned property under that section from its authority, under section 402(d), to acquire property that is owned by a railroad and gave the Commission jurisdiction to compel the latter due to that agency's expertise in rail matters, including rail valuations. Moreover, the absence of any such restriction in section 402(d) is even further evidence of Congressional intent that Amtrak be empowered to acquire a line of railroad under that provision.[13] Thus, we conclude that section 402(d) does authorize the Commission to compel the conveyance of a line of railroad. Accordingly, B&M's rejection request is denied.[14]

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. A proceeding is instituted under section 402(d) of RPSA.

2. This proceeding will be handled under modified procedure. The parties must comply with the Commission's Rule of Practice, including 49 CFR 1104 and 1112. The procedural schedule measured from the date of service of this decision is set forth in the Appendix. Parties objecting to any aspect of the procedural schedule set forth herein shall file with the Commission and serve on the other parties their objections within 5 days of the date of service of this decision.

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[13] *See, e.g.*, 49 U.S.C. 11103, where Congress specifically limited the effect of provisions to terminal facilities.

[14] On April 13, 1988, we received a pleading filed by B&M styled "Reply of Boston and Maine Corporation to Supplemental Argument by National Railroad Passenger Corporation in Connection With Application." As we have stated, *supra*, all relevant issues raised by B&M on the merits will be considered during the course of this proceeding.

3. Amtrak must file with the Commission and serve on the parties within 5 days of service of this decision: (1) copies of its agreements with CV; (2) copies of its 1977 operating agreement with B&M; and (3) an environmental report (or state why an environmental report is not required here).

4. B&M's request that the application be rejected is denied.

5. The petitions to intervene filed by the Commonwealth of Massachusetts and the State of Vermont and the Connecticut Department of Transportation are granted.

6. CV's petition for exemption in F.D. 31259 is consolidated for handling with this proceeding.

7. Amtrak's petition for document discovery is granted.

8. CP's petition to intervene is granted.

9. This decision is effective upon date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Chairman Gradison dissented in part with a separate expression. Commissioner Lamboley, joined by Commissioners Simmons, dissented in part with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

CHAIRMAN GRADISON, dissenting in part:

In my view, the schedule originally proposed by Amtrak presented a more realistic timetable to consider the issues likely to be raised in this proceeding than does the one adopted today by the majority.

COMMISSIONER LAMBOLEY, WITH WHOM COMMISSIONER SIMMONS JOINS, dissenting in part:

These statutory dispute resolution procedures were initiated by an Amtrak filing on April 4, 1988.[1]

Amtrak and others[2] have requested expedited consideration of this application. The statute mandates the Commission to expedite such proceedings and to render decision not later than 120 days.[3]

Since filing there has been an effort to achieve a schedule for expedited action. Recognizing that this action comes to us because the parties could not reach voluntary agreement through negotiations and that the "construction season" in New England is short, it seems to us that 60 days is sufficient time in which to accomplish fair development of the record, argument and decision with respect to both "need" and "just compensation" issues.[4]

We take strong exception to the majority's bifurcation of these issues, and needless delay is scheduling decision on "just compensation." Merely shaving 20 days off the statutory outer limits for decision cannot, in our view, be fairly characterized as "expedited consideration."[5] Moreover, 100 days does little to recognize or make the necessary time available for needed rehabilitation and repair of the line. Decision in August severely restricts that opportunity in New England.

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[1] 45 USC Sec. 562(d)

[2] The Commonwealth of Massachusetts, the State of Vermont and Windsor Minerals, Inc., and several Senators and Congressmen from New England.

[3] 45 USC Sec. 562(d)(2)

[4] For this purpose an approrpiate 60-day procedural schedule was proposed.

[5] Statutory provision for 6% interest until compensation is paid cannot be construed to extend the 120-day limitation or otherwise require bifurcation in the face of clear congressional intent to expedite the process. See 45 USC Sec. 562(d)(2).

45 U.S.C. § 545. General powers

(d) Acquisition of property; declaration of taking; property compensation; procedures; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available—

(A) to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct and intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and

(B) to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required [for] intercity rail passenger service;

by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

(A) a statement of the public use for which the property is taken;

(B) a description of the property taken sufficient for the identification thereof;

(C) a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such or-

ders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

45 U.S.C. § 562. Facilities and service agreements

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

(1) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed.

(2) Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other

railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-way, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 [45 U.S.C.A. § 701 et seq.] and the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.]. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 120 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall not permit cross subsidization between intercity rail passenger service and rail freight services. The Commission, in making such a determination, shall assign to a freight railroad obtaining services pursuant to this paragraph the costs incurred by the Corporation solely for the benefit of that railroad, plus a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of the Corporation and such freight railroad. The proportionate share of such other costs assigned to a freight railroad shall be based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of the rail properties covered by this paragraph. Nothing in this paragraph shall be construed to preclude parties from entering into an agreement under this paragraph either before or after a determination of the Commission under this paragraph.

(b) Immediate availability of tracks and other facilities

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) Emergency measures

To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) Disagreement procedures

(1) If the Corporation and a railroad are unable to agree upon terms for the sale of the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

> **(A)** conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> **(B)** the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title;

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) Preferences for intercity or commuter passenger trains

(1) Except in an emergency, intercity or commuter passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of Title 5, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) Accelerated speeds

If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit

such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

(g) Operation of additional trains

Upon receipt of an application from the Corporation in any situation where the Corporation is unable to obtain a satisfactory, voluntary agreement from a rail carrier for operation of additional trains on the rail lines of that rail carrier, the Secretary may, after a hearing on the record, order such rail carrier, within 60 days, to permit or provide requested operation of trains of the Corporation over such rail lines on schedules based upon legally permissible operating times. If the Secretary determines not to hold a hearing, the Secretary, within 30 days after receipt of an application from the Corporation, shall publish in the Federal Register his reasons for not holding a hearing. Any such hearing must include a consideration of whether such an order would unduly impair freight operations of the rail carrier involved, and the burden shall be on the rail carrier seeking to oppose the operation of an additional train to demonstrate that the requested operation will impair freight operations. In establishing such scheduled running times, the Secretary shall give proper consideration to the statutory goal that the Corporation shall implement schedules which will attain a system-wide average speed of at least 55 miles per hour which can be adhered to with a high degree of reliability and passenger comfort. The compensation payable by the Corporation to a rail carrier for an operation ordered pursuant to this subsection shall be that which is properly established pursuant to an agreement between the Corporation and such rail

carrier, or, in the absence of an applicable agreement, shall be determined by the Commission in a proceeding pursuant to subsection (a) of this section.

The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990)

Section 9(a). Section 402(d)(1) of Rail Passenger Service Act (45 U.S.C. § 562(d)(1)) is amended by adding at the end the following new sentence:

> "The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.".

(b) The amendment made by subsection (a) shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment).

Supreme Court, U.S.
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No. 90-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT STATE OF VERMONT IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the majority of a divided panel for the United States Court of Appeals for the District of Columbia Circuit erred in holding that the National Railroad Passenger Corporation's ("Amtrak's") authority, under § 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. § 562(d), to condemn railroad property "required for intercity rail passenger service" limits Amtrak to condemning only that property that Amtrak retains for its own use, where that holding (a) strips Amtrak of the crucial bargaining leverage Congress gave it in negotiating with private railroads over whose facilities Amtrak must operate, (b) conflicts with the Second Circuit's construction of precisely the same language in a companion provision of the RPSA, and (c) conflicts with the authoritative interpretation of the statute by the agency charged with administering it.

2. Whether the majority below erred in refusing to apply, on petition for rehearing, amendments to the RPSA that Congress passed for the express purpose of overturning the majority's initial decision in this case.

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Respondents.

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BRIEF OF RESPONDENT STATE OF VERMONT IN SUPPORT OF PETITIONER

BACKGROUND

The State of Vermont, an intervenor-respondent below, supports the petition filed by National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("CV"). From 1972 until April 1987, Amtrak operated the *Montrealer*, a passenger train that ran from Washington, D.C. to Montreal, Canada via Massachusetts, Vermont and New Hampshire. During its 15-year run, the *Montrealer* served as the sole passenger line linking Vermont to Canada, and to the northeastern United States seaboard between Boston and Washington, D.C.

As such, it carried thousands of residents and tourists in and out of Vermont and other New England states. Pet. App. 128a.

In the early 1980s, Amtrak's service on the route began to deteriorate due to maintenance deficiencies on a 48.8 mile stretch of the Connecticut River Line ("Conn River Line") owned by respondent Boston and Maine Corporation ("B&M"). Under a 1977 operating agreement, B&M was obligated to maintain the Conn River Line in a condition that permitted the *Montrealer* to operate at certain prescribed speeds, and Amtrak agreed to make maintenance payments in return for the specified maintenance level B&M was to provide. This arrangement proved satisfactory until 1983 and 1984, when Guilford Transportation Industries, Inc. ("Guilford") purchased the B&M and the Delaware and Hudson Railway Company ("D&H"), which operated track paralleling the Conn River Line. Thereafter, B&M began routing traffic over the D&H line and allowed its portion of the Conn River Line to fall into disrepair. By 1987, when Amtrak was forced to discontinue *Montrealer* service, average transit time over B&M's portion of the Conn River Line had increased 67% over 1981 levels, and 47 of the segment's 49 miles were subject to speed restrictions; indeed, during the last 11 months of *Montrealer* service, not one train met its contractually agreed upon schedule.

Amtrak expressed its concerns over the deterioration of the Conn River Line in a number of meetings and discussions with Guilford officers and staff in 1985 and 1986. Guilford made clear, however, that, given the availability of the parallel freight route over the D&H track, B&M did not need to upgrade or maintain the Conn River Line and had no intention of spending significant funds to do so. Indeed, in 1987 Guilford slated B&M's portion of the Conn River Line for possible abandonment.

Following discontinuance of the *Montrealer* in April, 1987, Amtrak invoked arbitration to compel B&M to live

up to its obligations under the 1977 operating agreement. B&M responded by terminating the contract and contesting the jurisdiction of the arbitrators. After Amtrak prevailed on the merits of its claims, B&M fought enforcement of the arbitration award.

In the meantime, Congress appropriated $5 million for the express purpose of enabling Amtrak to upgrade the Conn River Line and re-institute *Montrealer* service.[1] As a result, Amtrak sought to settle its differences with Guilford in a manner that would permit resumption of passenger service over the B&M portion of the line. Guilford, however, was unwilling to give assurances that it would provide long-term maintentance of the line, and in fact stated that it was considering abandoning the segment.[2]

Thereafter, Amtrak began examining the possibility of invoking its special power of eminent domain that Congress conferred in the Rail Passenger Service Act ("RPSA"). Section 402(d) of that Act permits Amtrak to acquire through condemnation "property (including interests in property) owned by [another] railroad and required for intercity rail passenger service" by applying to the ICC for an order establishing Amtrak's "need . . . for the property at issue and requiring the conveyance thereof" to Amtrak on just and reasonable terms. 45 U.S.C. § 562(d). Amtrak's need for such property is *presumed* to be established unless the Commission finds that conveyance of the property would significantly impair the condemnee's ability to fulfill its common carrier

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[1] Supplemental Appropriations Act, 1987, Pub. L. No. 700-71, 101 Stat. 391, 447-48 (July 11, 1987).

[2] On March 24, 1988, two days *after* Amtrak filed formal notice that it was invoking its condemnation powers to acquire B&M's portion of the Conn River Line, B&M filed an amended System Diagram Map with the Interstate Commerce Commission ("ICC" or "Commission") that removed this portion of the line from its list of tracks and facilities potentially subject to abandonment.

obligations *and* that Amtrak's obligation to provide efficient and economical rail passenger service "can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak]," or is available by virtue of Amtrak's § 305(d) authority to condemn non-railroad property. *Id.* § 562(d)(1)(B).

Because Amtrak lacked funds to purchase, rehabilitate, and maintain the line, it entered into an agreement with CV whereby Amtrak would condemn B&M's interest in the segment and transfer it to CV (with Amtrak retaining operating rights) in exchange for the latter's agreement to upgrade the property promptly (at a cost to Amtrak of no more than $3.1 million) and to operate the segment on terms acceptable to Amtrak. This agreement met Amtrak's legitimate objectives by 1) securing the use of a properly maintained line for the *Montrealer* and 2) providing an assurance of future maintenance of that line 3) at reduced expense to the federal government.[3]

The State of Vermont, which was intimately familiar with the history of problems surrounding B&M's segment of the Conn River Line[4] and desirous of seeing interstate and international passenger service to Vermont resumed, strongly supported the Amtrak-CV agreement. Vermont not only intervened, along with Massachusetts and New Hampshire, in the administrative and subsequent judicial proceedings, it provided CV with over

[3] The transaction satisfies the statutory requirement of not significantly impairing the condemnee's ability to fulfill its common carrier obligations by granting B&M trackage rights over the line for its freight train operations.

[4] This familiarity stemmed, in part, from the State's investigation of a series of freight derailments on B&M's portion of the Conn River Line.

$870,000 to help pay for the acquisition of the line and over $265,000 for the rehabilitation of the line.[5]

Following ICC approval of Amtrak's acquisition and transfer of B&M's segment of the Conn River Line, a divided panel of the District of Columbia Circuit ruled that § 402(d) "unambiguously" precludes Amtrak from condemning an interest in railroad property that Amtrak does not intend to retain. Reasoning that the "statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service,"[6] the majority concluded that, because Amtrak did not intend to retain the fee simple interest it had condemned, that interest could not be "required for intercity rail passenger service." Pet. App. 18a.[7] Rather, the majority observed, what Amtrak really needs is use of B&M's segment of the line in a condition suitable for passenger rail service. *Id.* Because, the majority believed, Amtrak could obtain use of the line through the less drastic means of 1) condemning an easement in B&M's property that would allow Amtrak to maintain the line or 2) compelling B&M to grant Amtrak trackage rights pursuant to § 402(a) of the RPSA, the majority held that Amtrak

[5] See Vt. Acts (1987 Adj. Sess.) No. 211, Sec. 5 (eff. May 26, 1988). The State's provision of such funding is consistent with the assistance it had provided in the late 1970s to help B&M improve track and related equipment along the Conn River Line, and with the State's grade crossing improvements program, which had historically assigned special priority to Amtrak routes.

[6] See Pet. App. 17a (emphasis in original).

[7] The majority repeated this conclusion throughout its opinion. See Pet. App. 15a ("the Act does not permit Amtrak to take property . . . for which it concededly has no need itself"); *id.* 23a (the ICC's "construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak").

must exhaust these lesser remedies before resorting to condemnation of a fee simple interest.

While the case was still pending before the Court of Appeals on rehearing, Congress amended the RPSA specifically to permit the transaction contemplated by the Amtrak-CV agreement. The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a), 104 Stat. 4654, 4658 (November 28, 1990), permit Amtrak to "subsequently convey title or other interest in [Amtrak-condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of [the RPSA]." Congress, moreover, expressly made this provision applicable to the still-pending proceeding before the Court of Appeals. On rehearing, however, the panel majority concluded that the amendment did "not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a.

ARGUMENT

The decision below thwarts Vermont's efforts to regain the benefits of interstate passenger rail service. In rendering that decision, the panel majority flouted an unambiguous directive from Congress; substituted its interpretation of the governing statute for the ICC's presumptively authoritative interpretation; created a conflict among the circuits; and stripped Amtrak of its leverage in negotiating with railroads over whose lines it must run. Each of these untoward results is the product of the majority's unjustifiably narrow view of the property interests that Amtrak may "requir[e] for intercity rail passenger service." 45 U.S.C. § 562(d)(1). This Court must grant the petition in order to ensure that Amtrak is capable—as Congress unquestionably intended it to be—of acquiring and transferring property interests that enable it to provide "modern, efficient, and economical rail passenger service." *Id.* § 562(d)(1)(B).

1. The decision below hinges on the majority's determination that the property, or interests in property, that Amtrak "require[s] for intercity rail passenger service" is necessarily defined as that property, or those interests, that Amtrak condemns and *retains for its own use*. This construction of the phrase "required for intercity rail passenger service," which conflicts with the Second Circuit's interpretation of precisely the same language in a companion provision authorizing Amtrak to condemn non-railroad property (see 45 U.S.C. §545(d)), effectively robs Amtrak of the crucial leverage Congress gave it in negotiating with recalcitrant railroads over whose lines Amtrak must operate. Neither the language nor structure of the statute "unambiguously" compels this limitation on Amtrak's condemnation power and the resulting impairment of Amtrak's ability to provide efficient and economical service throughout the nation.

The RPSA nowhere defines the phrase "required for intercity rail passenger service," nor is this language self-defining. The majority nevertheless found § 402(d) "clear enough" in its command "that the property acquired by condemnation must be required by Amtrak for *its* use." Pet. App. 17a (emphasis in original). As the facts of this very case make clear, however, even the majority's definition of Amtrak's "needs" does not preclude Amtrak from subsequently transferring a fee simple interest that it condemns.

Here, Amtrak "used" B&M's fee simple interest in the Conn River Line—by transferring that interest to CV—to obtain a guarantee that the line in which it was going to invest over $3 million for rehabilitation would be maintained in a condition suitable for passenger service. This use of B&M's property interest, morever, was clearly necessary to Amtrak's acquisition of properly-maintained tracks. Had Amtrak sought, pursuant to its § 402(a) authority (see 45 U.S.C. § 562(a)), to compel trackage rights over B&M's portion of the Conn River Line, it would have

gained no greater assurance of proper maintenance than it had possessed under its 1977 Operating Agreement with B&M. B&M's willingness to breach its maintenance obligations under that contract, and to terminate the contract when Amtrak sued for specific performance, readily demonstrated the futility of employing this less drastic statutory remedy. Nor would it have sufficed to condemn an easement in B&M's property. To begin with, at the time Amtrak exercised its § 402(d) powers, B&M had designated its portion of the Conn River Line for abandonment. Moreover, condemnation of an easement in property that B&M had consistently refused to maintain would have left Amtrak with all the burdens of owning the track without the full benefits of ownership. Given its statutory duty to "[e]xercise [its] best business judgment" (45 U.S.C. § 501a(1)), Amtrak properly rejected this unacceptable alternative.[8]

Thus, Amtrak indisputably "used" the fee simple interest it condemned to obtain properly-maintained tracks, without which it cannot provide efficient and economical passenger service. That this "use" did not also involve "retention" of the interest condemned made it no less necessary, or "required," for intercity passenger service.

Indeed, the Second Circuit has recognized that intercity rail passenger service may require the condemnation of property interests that Amtrak itself does not retain. In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) Amtrak condemned non-railroad property,

[8] The majority's imposition of a "lesser interest" requirement when Amtrak acts pursuant to subsection (d) cannot possibly be justified, as the majority suggested (see Pet. App. 22a), by the "interplay" of subsection (a) and (d). Once the ICC determines that statutorily-compelled trackage rights are inadequate to meet Amtrak's needs, any limiting effect that subsection (a) supposedly exerts over subsection (d) is clearly at an end. Thus, the requirement that Amtrak condemn lesser interests is clearly an extra-statutory policy choice that the majority simply imposed on Amtrak.

pursuant to § 305(d),[9] and reconveyed it to the City of New London, which in turn used the land for a public service road. Amtrak retained only an easement in the property that permitted it to use the road for access to, and inspection and maintenance of, certain of its facilities. Like the majority below, the condemnee argued that, while Amtrak was free to condemn property for its own service road, it could not do so for the City of New London. *Id.* at 1265. Noting Amtrak's duty to minimize its need for federal subsidies and to encourage third parties to share in the costs of rail passenger service, the Second Circuit found "no impropriety in Amtrak's condemnation of property within the scheme of an overall cooperative agreement with New London . . . whereby the service road, the need for which is unchallenged, is maintained by New London." *Id.*

The majority's construction of the phrase "required for intercity rail passenger service" is flatly inconsistent with the Second Circuit's interpretation of precisely the same language in *Two Parcels*. In both cases, Amtrak unquestionably needed to use certain physical property (a service road in *Two Parcels*, a segment of the Conn River Line, here), condemned a fee simple interest in that property, and conveyed that interest to a third party in exchange for that party's agreement to maintain the physical property.[10]

[9] Section 305(d) provides, in relevant part, that Amtrak may "acquire any right-of-way, land, or other property [except that of a railroad, State, or governmental agency], which is required [for] intercity rail passenger service[,] by the exercise of the right of eminent domain." 45 U.S.C. § 545(d)(1)(B).

[10] The majority mistakenly suggests that *Two Parcels* can be distinguished on the ground that there Amtrak condemned an easement. Pet. App. 2a. There as here, however, Amtrak condemned a fee simple interest which it did not retain. Nor does it matter that the cases involved different provisions of the RPSA, for "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treas-*

This clear conflict among the circuits, moreover, is of more than merely passing academic interest. Although Amtrak has invoked its condemnation powers only sparingly, the possibility of invocation is—as Congress undoubtedly intended it to be—an important aspect of the context in which Amtrak negotiates with private freight railroads. Congress expected that, rather than build its own network of tracks, Amtrak would operate over the tracks and facilities of other railroads; Congress therefore urged private railroads to cooperate with Amtrak (45 U.S.C. § 501(b)) and to share in the costs of its rail passenger services. *Id.* § 501a(2). Recognizing that these exhortations might not be sufficient to ensure the modern, efficient, and economical service it envisioned, Congress conferred on Amtrak its unique condemnation powers, which give Amtrak the leverage it needs to deal with recalcitrant railroads such as B&M.

The decision of the majority below strikes at the heart of the bargaining power Congress intended Amtrak to have vis-a-vis the private freight railroads whose facilities it must use, by emasculating Amtrak's ability to obtain the property and rights it requires for its passenger service. Indeed, B&M's willingness to abandon a segment of track it was contractually obligated to maintain for Amtrak's use, and to insist that Amtrak condemn an easement in that property and pay for maintenance that B&M itself refused to undertake, demonstrates the types of difficulties Amtrak may face if the decision below is allowed to stand. This Court should grant the petition in order to resolve the split of authority in the circuits and clarify that Amtrak may condemn interests in property that it does not retain, where the condemnation and

ury, 475 U.S. 851, 860 (1986) (citations omitted); see also *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983) (same).

subsequent transfer of such interests is necessary to its provision of passenger service.[11]

2. The Second Circuit's decision in *Two Parcels* reveals yet another flaw in the decision below. Under the principles this Court established in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the ICC's interpretation of a statute it is charged with administering is entitled to deference unless that interpretation is "contrary to clear congressional intent." *Id.* at 843 n.9. Of the six appellate judges that have considered the question, four (including Judge Ginsburg below) have concluded that the phrase "required for intercity rail passenger service" does not limit Amtrak to condemning only those interests in property that it retains for its own use. While the State of Vermont believes that the construction rendered by the Second Circuit (and Judge Ginsburg) is plainly the correct one, this division within the judiciary establishes, at a minimum, that the relevant statutory language is not so unambiguous as to admit of only one possible meaning. In circumstances such as these, *Chevron* required the court below to defer to the agency's clearly "permissible construction of the statute." *Id.* at 843.

Rather than do so, however, the majority engaged in a transparent attempt to circumvent *Chevron*'s requirements by manufacturing evidence of § 402(d)'s "unambiguous" meaning. Unable to identify any statutory language or legislative history demonstrating that "Congress has directly spoken to the precise question at issue" (*id.* at 842), the majority was forced to rely on 1) the

[11] All decisions of the ICC, which must approve Amtrak's exercise of its eminent domain powers, are reviewable in the District of Columbia Circuit, as well as in the court of appeals for the circuit in which an affected party "resides or has its principal office." 28 U.S.C. § 2343. The Commission itself, therefore, may be uncertain as to what law governs its review of Amtrak's use of § 402(d), given the split in authority and the Commission's inability to know, at the time of decision, which circuit will review its decision.

"interplay" of subsections (a) and (d) of the statute (Pet. App. 22a), neither of which even refers to, let alone expressly limits, the other; 2) a general congressional policy against cross-subsidization, even though the RPSA expressly encourages private sector support for passenger service (see 45 U.S.C. § 501a(2)) and there is no evidence in this case of any cross subsidy; 3) the absence of "a *clearer* statement from Congress that [it] intended" to permit Amtrak to condemn an interest it subsequently conveys (Pet. App. 21a (emphasis added)); and 4) a "colorable" constitutional question that "counsel[s] against imputing to Congress the intention to adopt the disputed meaning in the absence of some *clearer* evidence." *Id.* (emphasis added). As the foregoing recitation makes clear, the majority's determination that § 402(d) unambiguously *precludes* the ICC's interpretation is simply untenable. This Court should not countenance such a deliberate refusal to adhere to the standards of administrative review articulated in *Chevron*.

3. The State of Vermont believes that, for the reasons set forth above, the court's initial decision warrants review by this Court. The majority's remarkable response to congressional efforts to overturn that decision, however, provides yet another, entirely independent basis for review.

While the majority's initial decision was still subject to rehearing, Congress amended the RPSA specifically to provide that Amtrak "may subsequently convey title or other interest in [Amtrak-condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." Congress expressly made the amendment applicable to this case, [12]

[12] The amendment provided that it "shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment.)" Pub. L. No. 101-641, § 9(b).

and the amendment's sponsor explained that the law was prompted by, and designed to correct, the majority's initial decision.[13]

Incredibly, having previously rejected the ICC's construction of the statute because of the supposed lack of "clear" evidence that Congress intended to permit Amtrak to condemn interests it subsequently conveys, the majority deemed this amendment *irrelevant to this case*. The majority attempted to justify its decision by asserting that the amendment only permits Amtrak to convey property "subsequent to a condemnation that is otherwise valid" (Pet. App. 3a.) (emphasis deleted); because Amtrak did not need B&M's fee simple interest in the first place, the majority held, the amendment could not have authorized Amtrak to reconvey that interest to CV. This facile reasoning cannot disguise the fact that, as the majority has defined it, Amtrak's "need" is limited to that property which it intends to *retain for its own use*. Accordingly, because a property interest that Amtrak intends to convey to a third party can never, under the majority's view, be "required for intercity rail passenger service," the amendment can *never* be employed, for any attempt to invoke it would reveal the invalidity of the initial condemnation.

This, of course, is not statutory construction but statutory nullification. Barring constitutional infirmity, judges are not free to decline to enforce laws that Congress sees fit to enact. That, however, is precisely what the majority has done here. The majority's patent disregard of an explicit and unequivocal legislative command

[13] See 136 Cong. Rec. S17668 (daily ed. October 27, 1990) (statement of Sen. Jeffords):

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.

is an extraordinary circumstance requiring the exercise of this Court's supervisory powers.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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No. 90-1419

In The
Supreme Court of the United States
October Term, 1990

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT WINDSOR MINERALS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF OF RESPONDENT WINDSOR MINERALS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

INTRODUCTION

Windsor Minerals, Inc. ("Windsor") brings a unique perspective to this case.[1] It is the only party that has actually used the railroad services provided by Boston & Maine Corporation ("B&M") over the Connecticut River Line. Based

[1]Windsor is a subsidiary of Cyprus Minerals Company.

on that experience, Windsor has consistently supported, before the Interstate Commerce Commission (''Commission'') and in the court below, the acquisition by Petitioner National Railroad Passenger Corporation (''Amtrak'') of the Connecticut River Line, and the exemption of Amtrak's subsequent conveyance of that Line to Petitioner Central Vermont Railway, Inc. (''Central Vermont''). Windsor urges this Court to grant the petition for a writ of certiorari filed by Amtrak and Central Vermont (hereinafter ''Amtrak Petition'').

REASONS FOR GRANTING THE WRIT

Windsor fully supports the reasons for review by this Court cited in the Amtrak Petition. In addition, review is necessary because of the absence of record support for the lower court's key conclusion that Amtrak's needs could have been met by acquiring some lesser interest in the Line that would have left ownership and control in B&M's hands.

Throughout this case, B&M has sought to portray itself as a responsible railroad, living up to its common carrier obligations under the Interstate Commerce Act and unlawfully victimized when it refused to subsidize Amtrak's passenger operations through track upgrades. Nothing could be farther from the truth. Not only did B&M not meet its contractual maintenance and service obligations to Amtrak, leading to termination of *Montrealer* service in 1987[2], but B&M's service over the Line was not even adequate for freight shippers.

The most active of the shipper parties in the Commission proceedings (all of which opposed retention of the Line by B&M) was Windsor, a talc shipper located on the Green Mountain Railroad eighteen miles from Bellows Falls, Vermont, the

[2]*See* Amtrak Petition at 4-5 and 26a.

point on the Line at which the Green Mountain interchanged traffic with B&M. Windsor shipped to customers throughout the United States, with the exception of the far west. Because Central Vermont's trackage rights agreement with B&M did not permit the Green Mountain to interchange traffic with Central Vermont at Bellows Falls, Windsor had to rely on B&M for service over the Line on its southbound shipments.

Windsor testified before the ICC that, as early as 1986, B&M service began to decline markedly, as B&M let its track deteriorate and proved itself unable to move cars when needed on the Connecticut River Line. Windsor began a series of efforts before the Commission to induce B&M to comply with its common carrier obligations. Because of B&M's abysmal service, Windsor's efforts included seeking and obtaining a temporary reroute order under 49 U.S.C. § 11124, which permits the Commission to order traffic handled over other lines when it finds that a rail carrier ''cannot transport the traffic offered to it in a manner that properly serves the public.'' Windsor also filed an informal complaint concerning B&M's poor service in January 1988, three months before Amtrak filed its application.

In addition, Windsor testified that it pursued self-help measures, sending its southbound railroad traffic *north* in a circuitous routing of almost 300 miles, in order to avoid rail service via B&M. This was a desperate measure, and it was a burden for Windsor to absorb the extra costs of up to $12 per ton on its low-value, long-distance bulk freight shipments in the competitive talc market. However, the alternative was to lose customers due to B&M's inadequate service.

The record below negates both B&M's claim that the Amtrak acquisition would impair its ability to fulfill its common carrier obligations, and B&M's contention that Amtrak should have sought only trackage rights or an easement, with

ownership left in B&M's hands. Since either of these conditions establishes Amtrak's need for the Line, the statutory requirements were more than met. So long as B&M retained ownership of the Line it would retain control over the performance of maintenance, the lack of which led to the original cessation of *Montrealer* service. On the other hand, conveyance of the Connecticut River Line to Amtrak and reconveyance to Central Vermont for repair and maintenance, with trackage rights preserved for the B&M, *enhanced* B&M's ability to meet its common carrier obligations, and gave Amtrak the assurance it needed that the Line could be both upgraded and maintained in good condition.[3]

B&M allowed its track and service to deteriorate to the point of being almost beyond repair, and yet it refused to sell the Connecticut River Line to Amtrak on reasonable terms or to provide dependable rail service. Amtrak was thus confronted with a "dog in the manger" — an incumbent freight railroad that was not only unwilling to live up to its own service and maintenance obligations but also unwilling to step aside so others could implement the necessary remedial measures. This is precisely the situation in which Amtrak's condemnation power is most needed.

[3]Thus, the last answer in the colloquy quoted in Judge Ginsburg's dissent in the decision below (Amtrak Petition at 27a) was not correct.

CONCLUSION

For the foregoing reasons, and those set forth in Amtrak's Petition, the requested writ of certiorari should be granted.

Respectfully submitted,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF BOSTON AND MAINE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly set aside the Order of the Interstate Commerce Commission and remanded for further proceedings on the grounds that the Commission failed to make requisite findings of fact under Section 402 of the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. 562 (1988), before allowing Amtrak to exercise the power of condemnation.

2. Whether the court of appeals' reversal of the Interstate Commerce Commission's Order exceeded the proper scope of review.

3. Whether the court of appeals' holding creates a conflict between the circuits as to the interpretation of Section 402 of the Rail Passenger Service Act.

PARTIES TO THE PROCEEDING

The petition at ii sets forth the required disclosure under Rule 29.1 of the Rules of this Court.

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BRIEF OF BOSTON AND MAINE CORPORATION IN OPPOSITION

Respondent Boston and Maine Corporation ("Boston and Maine") respectfully requests that this Court deny the petition of National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont") for a writ of certiorari, seeking review of the District of Columbia Circuit's judgment entered on August 10, 1990, reported at 911 F.2d 743 (1990), and its Order denying rehearing entered on February 1, 1991 (App. 1a-4a).

STATEMENT OF THE CASE

Prior to 1988, Boston and Maine and Central Vermont, longtime competitors for freight rail business in New England, each owned large stretches of the Connecticut River Line, a rail line running between Springfield, Massachusetts and White River Junction, Vermont. Each had the right to operate over the other's rails in accordance with a trackage rights agreement dating back to 1930.

In 1972, Amtrak began running the "Montrealer" passenger train over this line but discontinued that service in 1987. Amtrak contended that service was discontinued due to the condition of the Boston and Maine-owned tracks which, while satisfactory for Boston and Maine's freight traffic, would not permit passenger train service at 60 miles per hour. At that point, the dispute between Amtrak and Boston and Maine centered around responsibility for the cost of upgrading the tracks, with Boston and Maine taking the position that it would cooperate in the project to upgrade the tracks provided that Amtrak agreed to pay its share of the costs associated with maintaining tracks suitable for trains traveling at 60 miles per hour.

In January 1988, Amtrak and Central Vermont entered into an Acquisition Agreement under which Central Vermont would provide funds to allow Amtrak to offer to purchase a 49-mile stretch of the Connecticut River Line from Boston and Maine. Under the Acquisition Agreement, if Boston and Maine did not accept the offer, Amtrak would file a proceeding under Section 402(d) of the Rail Passenger

Service Act of 1970, as amended, 45 U.S.C. § 562(d) (1988) ("RPSA"), to acquire the Boston and Maine property by eminent domain and thereafter convey it to Central Vermont. On March 18, 1988, Amtrak gave Boston and Maine an ultimatum. Boston and Maine could sell its portion of the Connecticut River Line to Amtrak, or Amtrak would proceed before the Interstate Commerce Commission ("Commission") with condemnation proceedings. In response to Amtrak's "take-or-leave" offer, Boston and Maine reaffirmed its desire to cooperate in the project to upgrade the tracks and expressed its willingness to submit the issue of apportionment of additional costs to a third party such as the Commission for resolution. Amtrak treated Boston and Maine's response as a rejection and promptly proceeded with condemnation proceedings under RPSA Section 402(d).

The Commission granted the application of Amtrak to condemn the 49 miles of Boston & Maine Connecticut River Line property and to reconvey that property to Central Vermont. *National Railroad Passenger Corp.*, 4 I.C.C. 2d 761 (1988). On the petition of Boston and Maine, the court below reversed the Commission's Order and remanded the case for further proceedings. *Boston and Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990), *reh'g denied*, Nos. 88-1631 *et al.*, Order (D.C. Cir. Feb. 1, 1991) (*per curiam*). The court held that the Commission failed to make the necessary fact finding under RPSA and, further, that the Commission's construction of RPSA "is contrary to its unambiguous meaning." 911 F.2d at 753

In reviewing the sufficiency of the Commission's fact-finding, the court first found that the Commission failed to make the finding required under RPSA that

the extent of the property interest which Amtrak took from Boston and Maine was "required for intercity rail passenger service." *Id.* at 750. The court also found that the Commission had inadequately responded to Boston and Maine's claim that its ability to perform its common carrier obligations would be substantially impaired by the condemnation. The court reasoned that "the [Commission's] cursory statement that [Boston and Maine's] ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor" did not satisfy section 402(d)(1)(A) of RPSA. *Id.* at 751.

The majority also held that the Commission did not adequately consider whether Amtrak could meet its obligation to provide economical rail passenger service by acquiring alternative property or a lesser property interest, such as an easement for passenger service over Boston and Maine's tracks instead of condemnation of the entire estate. The court found that the Commission's rejection of Boston and Maine's "lesser interest" argument was inadequate because it "rested on the conclusory assertion that Amtrak has demonstrated sufficient reason to justify acquisition of the line." *Id.* Because the Commission's findings utterly failed to address the prerequisites in section 402(d)(1)(A) and (B) to the issuance of a valid condemnation order, the majority concluded that "the Commission's conclusory assertions fail the requirement of reasoned decisionmaking" and set aside the Commission's order. *Id.* Judge Ruth B. Ginsburg concurred in the majority's assessment of the Commission's fact-finding, concluding that "the ICC shirked its obligation in this case to monitor closely Amtrak's

exercise of the broad eminent domain power conferred by section 402(d) of the RPSA." *Id.* at 755.

Petitioners sought rehearing from the court of appeals and while the petition was pending, Congress enacted the Independent Safety Board Act Amendments of 1990. Pub. L. No. 101-641, 104 Stat. 4654 ("1990 Amendment"). Section 9(a) of the 1990 Amendment provides that in the case of a condemnation under Section 402(d)(1) of RPSA, Amtrak may subsequently convey title or other interest in the property condemned to a third party, if such reconveyance is found by the Commission to further the purposes of the RPSA. 104 Stat. at 4658. The 1990 Amendment was brought to the attention of the court of appeals which, after consideration, denied rehearing in a *per curiam* opinion. *Boston and Maine Corp. v. Interstate Commerce Commission*, Nos. 88-1631 *et al.*, Order (D.C. Cir. Feb. 1, 1991) (App. 1a-4a).

In its Order denying rehearing, the court held that the 1990 Amendment "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' " *Id.*, Order at 3. The court had originally voided Amtrak's reconveyance of Boston and Maine's rail lines to Central Vermont not only because it found no express congressional authorization for that transaction but also because the Commission did not support with adequate findings of fact its approval of the initial condemnation of Boston and Maine's property. In considering the 1990 Amendment, the court stated that, while the new language plainly authorizes Amtrak to convey property *subsequent* to a condemnation that is otherwise valid under RPSA Section 402(d)(1), it does

not affect the requirement under the statute that Amtrak's use of its eminent domain power must be justified in the first instance. *Id.*

ARGUMENT

Petitioners assert that the court below failed to follow what they claim to be the clear legislative intent expressed in the 1990 Amendment. Petitioners also contend that the court below improperly rejected the Commission's interpretation of RPSA and that there exists a conflict with a decision of the Second Circuit. However, the 1990 Amendment does not affect the court of appeals' central determinations that the Commission misconstrued RPSA and that its proceedings were otherwise flawed by the absence of adequate fact finding to support reasoned decisionmaking; nor is there a conflict among the circuits that calls for this Court's review.

1. The court below held that section 402 of RPSA created parallel procedures by which Amtrak can secure the services, facilities and properties it requires at reasonable costs. Section 402(a) sets forth the procedure which applies when Amtrak wishes to contract for the use of a railroad's services, tracks and other facilities; the other procedure, contained in Section 402(d), applies when Amtrak needs to acquire a railroad's property through condemnation proceedings. 911 F.2d at 752. The court below found that the unambiguous meaning of the statute required the Commission to consider and make appropriate findings regarding the various options available under Section 402 of RPSA before allowing Amtrak to condemn the line, particularly in light of the availability of lesser interests which might serve Amtrak's needs,

consonant with the statutory framework. *Id.* at 753. Although Judge Ginsburg did not concur in the panel's construction of RPSA, she concurred in the panel's remand order because the Commission "had made no independent effort to ascertain whether the [Boston and Maine-Central Vermont] conveyance was in fact required to meet Amtrak's passenger service obligations." *Id.* at 755.

Moreover, the court below cannot be faulted for its interpretation of the 1990 Amendment which authorizes Amtrak, after a valid condemnation of another railroad's property under RPSA Section 402(d)(1), to "subsequently convey title or other interest in such property to a third party. . . . " 104 Stat. at 4658. In denying the petition for rehearing, the court below correctly observed that while the new statute "plainly authorizes Amtrak to convey property *subsequent to* a condemnation that is otherwise valid under Section 402(d)(1)," Section 402 still precludes Amtrak from resorting to its condemnation power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its Section 402(a) power. *Boston & Maine Corp.*, Order (denying rehearing) at 3 (App. 3a) (emphasis in original). The court below also noted in denying rehearing that it had concluded that the Commission had not made adequate findings under Section 402(d)(1) and, therefore, had not properly determined that the condemnation of the Boston and Maine line was required for Amtrak's services. *Id.* In a separate statement, Judge Ginsburg adhered to her view expressed in the concurring opinion that, despite the 1990 Amendment, the "Commission *itself*" had

not yet made proper findings required under RPSA. *Id.*, Order at 4 (App. 4a) (separate statement of Ginsburg, J.) (emphasis in original). Because the 1990 Amendment does not deal with the core rulings of the court below, and in light of the remand for further proceedings by the Commission, there is no warrant for review by this Court.

2. Petitioners also contend that the court below failed to follow this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) by deferring to the Commission's construction of RPSA Section 402(d). This argument mischaracterizes the decision of the court below which was unanimous in holding that the Commission failed to make adequate findings in support of its Order under RPSA Section 402(d). Nor does the enactment of the 1990 Amendment add any force to petitioners' contention. Apart from the plain language of the statute, which concerns only reconveyances following a valid condemnation, the 1990 Amendment contains no expression of legislative intent. That amendment, introduced and passed on the last full day of the 101st Congress, without floor debate, committee hearings or committee reports, does not address the procedures, requirements, or interplay of provisions contained in Section 402 of RPSA. Moreover, the court below noted, "[t]he Commission did concede that the use of the Section 402(d) proceeding [in this case] was extraordinary—the first time, in fact, that it has ever been used." 911 F.2d at 749. In light of the failure of the Commission to engage in the fact findings which the court below unanimously found were required by RPSA, there is no basis under *Chevron* to justify further review by

this Court. Indeed, the interlocutory nature of the court of appeals' remand order renders this case not yet ripe for review. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967).

3. This case presents no conflict with *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987). *Two Parcels* involved the condemnation of non-railroad property held by a private party, under Section 305(d)(1)(B) of RPSA. 45 U.S.C. § 545(d)(1)(B)(1988). As the court below pointed out, Section 402 of RPSA governs Amtrak's authority to secure the use of tracks and other rail facilities owned or operated by other railroads. The interplay between subsections (a) and (d) of Section 402 reveal congressional concern about competition in the rail industry and, in particular, cross-subsidization of Amtrak's rail passenger service by the nation's other railroads. *Boston and Maine Corp.*, 911 F.2d at 752-53; Order (denying rehearing) at 2 (App. 2a). The policy issues involved in a transfer between competing railroads of a line in which Amtrak already has trackage rights are not germane to Section 305. Moreover, in *Two Parcels*, the adequacy of the Commission's findings in support of Amtrak's condemnation was not challenged and, therefore, was not evaluated by the court of appeals. In contrast, the adequacy of the Commission's findings on the need for Amtrak's condemnation is central to the court of appeals' decision in this case and thus there is no conflict justifying review by this Court.

4. Finally, the State of Vermont ("Vermont") and Windsor Minerals Inc. ("Windsor") filed briefs in support of the petition. Windsor's factual assertions are,

of course, more properly directed to the proceedings on remand to the Commission. The burden of Vermont's argument is its contention that the court below "stripped Amtrak of its leverage in negotiating with railroads" over use of their lines. (Vermont Br. 6). But Amtrak's "leverage" can only be exercised within the statutory framework which calls for particularized findings by the Commission. The court below was unanimous in holding that the Commission failed to make adequate findings to support a condemnation under Section 402(d) of RPSA and nothing in the 1990 Amendment, which deals only with Amtrak's authority to convey property, with Commission approval, subsequent to a condemnation proceeding, affects that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1991

(5) (4)

Nos. 90-1419, 90-1769

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,

Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,

Respondents.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Exhibit 2 To The Verified Statement Of James L. Larson Submitted To The ICC, Dated April 4, 1988	JA-59
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Verified Statement Of Herbert F. Longhelt Submitted To The ICC, Dated April 4, 1988 (With Exhibits)	JA-67
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Memorandum From Gerald L. Maas To Ronald E. Lawless, Dated January 6, 1988, Submitted To The ICC As Document 2, Tab 5, To The Argument And Evidence Of Boston And Maine Corporation Filed May 31, 1988 ..... JA-92

Verified Statement Of David A. Fink Submitted To The ICC, Dated May 27, 1988 ..... JA-96

Verified Statement Of F. Colin Pease Submitted To The ICC, Dated May 27, 1988 ..... JA-102

Verified Rebuttal Statement Of Gerald L. Maas Submitted To The ICC, Dated June 2, 1988 ..... JA-114

Verified Rebuttal Statement Of James L. Larson Submitted To The ICC, Dated June 3, 1988 ..... JA-128

Verified Statement Of F. Colin Pease Submitted To The FCC, Dated June 29, 1988 (Including Exhibit A) JA-139

Verified Statement Of F. Colin Pease Submitted To The ICC, Dated July 19, 1988 ..... JA-145

NOTATION OF CROSS-REFERENCED RECORD MATERIALS

The following decisions and orders have been omitted in the printing of this Joint Appendix, pursuant to Supreme Court Rule 30.1, because they appear on the following pages in the Appendix to the printed Petition for *Certiorari* ("Pet. App.") filed in No. 90-1419:

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Final Decision Of The Interstate Commerce Commission, Served August 9, 1988	29a
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BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket Nos. 31250 and 31259

National Railroad Passenger Corporation—Conveyance Of Boston And Maine Corporation Interests In Connecticut River Line In Vermont And New Hampshire,

And

Central Vermont Railway, Inc.—Petition For Exemption—Acquisition And Operation Of Certain Interests In Rail Lines From The National Railroad Passenger Corporation

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CONSOLIDATED DOCKET ENTRIES

Document	**Date**
National Railroad Passenger Corp.'s Notice Of Intention To File Section 402(d) Application (F.D. No. 31250)	Filed March 22, 1988
Commonwealth Of Massachusetts' Petition To Intervene In F.D. No. 31250 And Comments	Filed April 1, 1988
Windsor Minerals, Inc.'s Comments	Filed April 1, 1988
National Railroad Passenger Corp.'s Section 402(d) Application And Memorandum Of Law	Filed April 4, 1988

Boston & Maine Corp.'s Statement In Opposition To National Railroad Passenger Corp.'s Section 402(d) Application	Filed April 6, 1988
Boston & Maine Corp.'s Letter Transmitting Exhibits A And B To Its Statement In Opposition	Filed April 6, 1988
Central Vermont Railway, Inc.'s Petition For Exemption Regarding Its Acquisition And Operation Of Certain Interests In Rail Lines From National Railroad Passenger Corp. (F.D. No. 31259)	Filed April 7, 1988
National Railroad Passenger Corp.'s Reply To Boston & Maine Corp.'s Statement In Opposition	Filed April 8, 1988
National Railroad Passenger Corp.'s Petition For An Order Requiring Production Of Documents	Filed April 11, 1988
State Of Vermont's Petition To Intervene In F.D. No. 31250 And Comments	Filed April 14, 1988
Boston & Maine Corp.'s Reply To State Of Vermont's Petition To Intervene	Filed April 14, 1988
Canadian Pacific, Ltd.'s Petition To Intervene In F.D. No. 31250 And Motion To Broaden The Scope Of The Proceedings	Filed April 20, 1988
National Railroad Passenger Corp.'s Reply To Canadian Pacific's Motion To Broaden The Scope Of The Proceedings	Filed April 22, 1988

Boston & Maine Corp.'s Verified Petition To Convert National Railroad Passenger Corp.'s Section 402(d) Application Into A Section 402(a) Application	Filed April 22, 1988
Commonweaith Of Massachusetts' Petition To Intervene In F.D. No. 31259	Filed April 25, 1988
Ascutney Travel, Inc.'s Comments	Filed April 27, 1988
Windsor Minerals, Inc.'s Petition To Intervene In F.D. No. 31259	Filed April 27, 1988
State Of Vermont's Petition To Intervene In F.D. No. 31259	Filed April 28, 1988
Decision: A Proceeding Is Instituted Under Section 402(d) Of RPSA And This Proceeding Will Be Handled Under Modified Procedure; Boston & Maine Corp.'s Request That The Application Be Rejected Is Denied; The Petitions To Intervene By Commonwealth Of Massachusetts, State Of Vermont, And Connecticut Department Of Transportation Are Granted; Central Vermont Railway, Inc.'s Petition Of Exemption In F.D. No. 31259 Is Consolidated For Handling With This Proceeding; National Railroad Passenger Corp.'s Petition For Document Discovery Is Granted; Canadian Pacific's Petition To Intervene In F.D. No. 31250 Is Granted. This Decision Is Effective Upon April 29, 1988.	Entered April 29, 1988

Comments Of Railway Labor Executives' Association	Filed April 29, 1988
Rail Travel Center's Support Letter	Filed May 2, 1988
National Railroad Passenger Corp.'s Supplemental Information In Support Of Application	Filed May 2, 1988
National Railroad Passenger Corp.'s Interrogatories And Document Requests To Boston & Maine Corp.	Filed May 2, 1988
Comments Of Robert A. Johnson	Filed May 3, 1988
Railway Labor Executives' Association's Petition To Intervene And Request For Clarification Of The Procedural Schedule	Filed May 3, 1988
Comments Of Scott Palmer	Filed May 4, 1988
Boston & Maine Corp.'s Objection To Procedural Schedule	Filed May 4, 1988
National Railroad Passenger Corp.'s Verified Opposition To Boston & Maine Corp.'s Verified Petition To Convert Section 402(d) Application Into Section 402(a) Application	Filed May 5, 1988
National Railroad Passenger Corp.'s And Central Vermont Railway, Inc.'s Reply To Boston & Maine Corp.'s Objection To Procedural Schedule	Filed May 5, 1988

Boston & Maine Corp.'s Interrogatories And Documents Requests To National Railroad Passenger Corp.	Filed May 7, 1988
Boston & Maine Corp.'s Interrogatories And Document Requests To Central Vermont Railway, Inc.	Filed May 7, 1988
Boston & Maine Corp.'s Interrogatories And Document Requests To State Of Vermont	Filed May 7, 1988
National Railroad Passenger Corp.'s And Central Vermont Railway, Inc.'s Letter To Counsel For Boston & Maine Corp. Clarifying The Scope Of One Of The Requests For Document Production	Filed May 9, 1988
Boston & Maine Corp.'s Supplemental Interrogatories And Document Requests To Central Vermont Railway, Inc.	Filed May 9, 1988
Railway Labor Executives' Association's First Set Of Discovery Requests To Boston & Maine Corp.	Filed May 9, 1988
Railway Labor Executives' Association's First Set Of Discovery Requests To Central Vermont Railway, Inc.	Filed May 9, 1988
Railway Labor Executives' Association's First Set Of Discovery Requests To National Railroad Passenger Corp.	Filed May 9, 1988
State Of New Hampshire's Petition To Intervene	Filed May 10, 1988

Decision: Boston & Maine Corp.'s Request To Amend The Procedural Schedule Set Forth In Decision Of April 29, 1988 Is Denied; Railroad Labor Executives' Association's Petition To Intervene Is Granted; Windsor Minerals, Inc.'s Petition To Intervene Is Granted	Entered May 11, 1988
State Of New Hampshire's Comments/Evidence	Filed May 14, 1988
State Of Vermont's Comments	Filed May 16, 1988
Central Vermont Railway, Inc.'s Verified Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 16, 1988
National Railroad Passenger Corp.'s Verified Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 16, 1988
Central Vermont Railway, Inc.'s Verified Responses To Boston & Maine Corp.'s Supplemental Interrogatories And Document Requests	Filed May 16, 1988
National Railroad Passenger Corp.'s Verified Supplemental Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 17, 1988
Boston & Maine Corp.'s Petition To Reopen ICC's Decision Of April 29, 1988	Filed May 19, 1988
Boston & Maine Corp.'s Motion To Compel Discovery From National Railroad Passenger Corp. And Central Vermont Railway, Inc.	Filed May 21, 1988

National Railroad Passenger Corp.'s Response To Boston & Maine Corp.'s Petition To Reopen ICC's Decision Of April 29, 1988	Filed May 24, 1988
Comments of Bruce MacPhail	Filed May 24, 1988
Decision: Boston & Maine Corp.'s Petition To Convert National Railroad Passenger Corp.'s Section 402(d) Application To A Section 402(a) Application Is Denied; The Petitions To Intervene In F.D. No. 31259 Filed By Commonwealth Of Massachusetts And State Of Vermont Are Dismissed; The Petition To Intervene By The State Of New Hampshire Is Granted. This Decision Is Effective May 25, 1988.	Entered May 25, 1988
Central Vermont Railway, Inc.'s Verified Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 25, 1988
National Railroad Passenger Corp.'s Verified Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 25, 1988
Central Vermont Railway, Inc.'s Verified Supplemental Response To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 25, 1988
National Railroad Passenger Corp.'s Supplemental Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 25, 1988

Joint Response Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Boston & Maine Corp.'s Motion To Compel Discovery	Filed May 25, 1988
Central Vermont Railway, Inc.'s Verified Response To Railway Labor Executives' Association's First Set Of Discovery Requests	Filed May 26, 1988
State Of Vermont's Responses To Boston & Maine Corp.'s Interrogatories And Document Requests	Filed May 27, 1988
Boston & Maine Corp.'s Argument And Evidence In Opposition To National Railroad Passenger Corp.'s Section 402(d) Application And Central Vermont Railway, Inc.'s Petition For Exemption	Filed May 31, 1988
Canadian Pacific Ltd.'s Comments And Argument In Opposition To Central Vermont Railway, Inc.'s Petition For Exemption	Filed May 31, 1988
National Railroad Passenger Corp.'s Verified Response To Railway Labor Executives' Association's First Set Of Discovery Requests	Filed May 31, 1988
Windsor Minerals, Inc.'s Reply Verified Statement In Opposition To Boston & Maine Corp.'s Argument And Evidence	Filed June 3, 1988

Decision: Boston & Maine Corp.'s Motion To Compel Discovery Is Denied. This Decision Is Effective June 3, 1988.	Entered June 3, 1988
Decision: Boston & Maine Corp.'s Petition To Reopen The ICC's Decision Of April 29, 1988 Is Denied. This Decision Is Effective June 3, 1988.	Entered June 3, 1988
Commonwealth Of Massachusetts' Reply Verified Statement Of Fredrick P. Salvucci	Filed June 3, 1988
Central Vermont Railway, Inc.'s Rebuttal Testimony	Filed June 3, 1988
National Railroad Passenger Corp.'s Rebuttal Testimony	Filed June 3, 1988
Commonwealth Of Massachusetts' Verification To Reply Verified Statement Of Frederick P. Salvucci	Filed June 6, 1988
Decision: National Railroad Passenger Corp.'s Motion To Compel Discovery Is Granted	Entered June 8, 1988
State Of Vermont's Brief In Support Of National Railroad Passenger Corp.'s Section 402(d) Application And Central Vermont Railway, Inc.'s Petition For Exemption	Filed June 8, 1988
Windsor Minerals, Inc.'s Brief	Filed June 8, 1988
Commonwealth Of Massachusetts' Final Brief On Need And Exemption Issues	Filed June 8, 1988

Reply Brief Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. On Need Issues And Exemption Petition	Filed June 8, 1988
Boston & Maine Corp.'s Supplemental Argument	Filed June 8, 1988
Canadian Pacific, Ltd.'s Initial Brief	Filed June 8, 1988
Notice To The Parties Regarding Briefing On Proposed Terms And Conditions Of Conveyance Of Connecticut River Line (Jane F. Mackall, Director, Office Of Proceedings)	Entered June 8, 1988
Comments Of Tracy Didas	Filed June 10, 1988
Comments Of H.P. Harrison	Filed June 10, 1988
Comments Of Railway Labor Executives' Association Regarding National Railroad Passenger Corp.'s Section 402(d) Application	Filed June 10, 1988
Letter Of Counsel For National Railroad Passenger Corp. Regarding Status Of Boston & Maine Corp.'s Responses To Interrogatories And Document Requests	Filed June 13, 1988
Supplemental Verified Statement Of R.L. Banks And C.H. Banks	Filed June 13, 1988
Commonwealth Of Massachusetts' Opening Evidence And Argument Regarding "Just Compensation" Issue	Filed June 13, 1988

Boston & Maine Corp.'s Motion For Procedural Relief	Filed June 16, 1988
National Railway Passenger Corp.'s Motion To Compel Discovery And Reply To Boston & Maine Corp.'s Motion For Procedural Relief	Filed June 20, 1988
Canadian Pacific, Ltd.'s Petition To Recognize Substantially Changed Circumstances	Filed June 23, 1988
Boston & Maine Corp.'s Supplemental Statement Regarding National Railroad Passenger Corp.'s Section 402(d) Application And Central Vermont Railway, Inc.'s Petition For Exemption	Filed June 24, 1988
Decision: Boston & Maine Corp.'s Motion For Procedural Relief Is Premature And Will Not Be Acted Upon At This Time. This Decision Is Effective June 24, 1988.	Entered June 24, 1988
National Railroad Passenger Corp.'s Reply To Boston & Maine Corp.'s Motion For Procedural Relief	Filed June 27, 1988
Decision: National Railroad Passenger Corp.'s Motion To Compel Boston & Maine To Answer Interrogatory No. 26 Is Granted; Motion Is Otherwise Denied. This Decision Is Effective June 28, 1988.	Entered June 28, 1988
National Railroad Passenger Corp.'s Motion For Protective Order	Filed June 29, 1988

National Railroad Passenger Corp.'s Statement To Accompany Second Supplemental Verified Statement On Just Compensation And Second Supplemental Verified Statement Of R.L. Banks And C.H. Banks (CONFIDENTIAL)	Filed June 29, 1988
Decision: Parties Are To Submit Their Respective Positions And Arguments With Respect To Compensation In Accordance With The Set Procedural Schedule, In Anticipation Of ICC Decision On Or About August 8, 1988. This Decision Is Effective July 5, 1988.	Entered July 5, 1988
Decision: Boston & Maine Corp.'s Request For Additional Time To Submit Argument And Evidence On The Just Compensation Issue Is Denied; National Railroad Passenger Corp.'s Supplemental Evidence On The Issue Of Just Compensation Is Accepted; Boston & Maine Corp.'s Motion For Procedural Relief Is Denied. This Decision Is Effective July 5, 1988.	Entered July 5, 1988
Boston & Maine Corp.'s Argument And Evidence Regarding "Just Compensation" (Filed Under Seal, Not Available For Public Inspection)	Filed July 5, 1988

Decision: This Procedural Schedule Is Amended To Provide A Period Of 15 Days From July 5, 1988 For Parties To Supplement The Record On Competitive Concerns And An Additional 5 Days For Simultaneous Filing Of Replies. This Decision Is Effective On July 5, 1988.	Entered July 5, 1988
Railway Labor Executives' Association's Evidence And Brief On The Issue Of "Just Compensation"	Filed July 5, 1988
Railway Labor Executives' Association's Motion To File Late	Filed July 6, 1988
Boston & Maine Corp.'s Petition For Reconsideration With Regard To Certain Discovery Matters	Filed July 6, 1988
National Railroad Passenger Corp.'s Motion To Permit Boston & Maine Corp. To File Additional Evidence	Filed July 7, 1988
National Railroad Passenger Corp.'s Response To Boston & Maine's Corp.'s Petition For Reconsideration	Filed July 7, 1988
Decision: National Railroad Passenger Corp.'s Motion For Protective Order Is Granted; The Subject Material Filed Under Seal Will Not Be Made Available In The Public Docket In This Proceeding Or Otherwise Disclosed To The Public, Except As Specified. This Decision Is Effective July 11, 1988.	Entered July 12, 1988

Decision: National Railroad Passenger Corp.'s Motion To Permit Boston & Maine Corp. To File By July 13, 1988 Additional Evidence Limited To Issues Raised By The New Material In National Railroad Passenger Corp.'s June 28th Supplemental Evidence Is Granted. This Decision Is Effective On July 12, 1988.	Entered July 12, 1988
Commonwealth Of Massachusetts' Reply On "Just Compensation" Issue	Filed July 13, 1988
Supplemental Verified Statement Of Gordon H. Fay On Just Compensation	Filed July 13, 1988
State Of Vermont's Rebuttal Argument Regarding "Just Compensation"	Filed July 13, 1988
National Railroad Passenger Corp.'s Reply Brief And Rebuttal Testimony On Just Compensation Issues (Three Volumes)	Filed July 13, 1988
Decision: Boston & Maine Corp.'s Petition Requesting Reconsideration Of The Decision Served June 28, 1988 Compelling Boston & Maine To Answer Interrogatory No. 26 Is Denied. This Decision Is Effective July 19, 1988.	Entered July 19, 1988
State Of New Hampshire's Statement On Competitive Issues	Filed July 19, 1988
State Of Massachusetts' Statement	Filed July 20, 1988

Central Vermont Railway, Inc.'s Argument And Supplemental Evidence On Competitive Issues	Filed July 20, 1988
Canadian Pacific Ltd.'s Supplemental Statement And Evidence	Filed July 20, 1988
State Of Vermont's Statement Of Fact And Argument In Support Of Central Vermont Railway, Inc.'s Petition For Exemption	Filed July 20, 1988
Boston & Maine Corp.'s Supplemental Argument And Evidence	Filed July 20, 1988
Central Vermont Railway, Inc.'s Motion For Leave To File Verified Statement Of N.R. Cutler	Filed July 21, 1988
Boston & Maine Corp.'s Letter Addressed To Mr. Dicello Requesting That He Authorize Release Of Information	Filed July 21, 1988
Verified Statement Of N.R. Cutler	Filed July 22, 1988
Central Vermont Railway, Inc.'s Rebuttal Argument On Competitive Issues	Filed July 25, 1988
Windsor Minerals, Inc.'s Reply to Boston & Maine Corp.'s Supplemental Argument On Competitive Issues	Filed July 25, 1988
Canadian Pacific, Ltd.'s Reply To Supplemental Statements	Filed July 25, 1988
Boston & Maine Corp.'s Supplemental Reply Argument On Competitive Issues	Filed July 25, 1988

Boston & Maine Corp.'s Motion To File Additional Argument And Evidence	Filed August 3, 1988
Boston & Maine Corp.'s Supplemental Argument And Evidence Regarding "Just Compensation"	Filed August 3, 1988
ICC's Environmental Assessment Of Transactions Proposed In National Railroad Passenger Corp.'s Section 402(d) Application And Central Vermont Railway, Inc.'s Petition For Exemption	Entered August 5, 1988
Decision: Granting National Railroad Passenger Corp.'s Section 402(d) Application; Establishing Just Compensation; Imposing Terms And Conditions On The Transaction; Granting Central Vermont Railway, Inc.'s Petition For Exemption, Etc. This Decision Is Effective August 12, 1988.	Entered August 9, 1988
Boston & Maine Corp.'s Petition For Stay Pending Judicial Review	Filed August 12, 1988
Opposition Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Boston & Maine Corp.'s Petition For Stay	Filed August 12, 1988
State Of Vermont's Opposition To Boston & Maine Corp.'s Petition For Stay	Filed August 15, 1988
Windsor Minerals, Inc.'s Response In Opposition To Boston & Maine Corp.'s Petition For Stay	Filed August 17, 1988

Decision: Boston & Maine Corp.'s Petition For Stay Is Denied. This Decision Is Effective August 23, 1988.	Entered August 23, 1988
Decision: This Proceeding Is Reopened; Boston & Maine Corp.'s Additional Argument And Evidence On Just Compensation Filed August 3, 1988 Is Accepted; The Prior Finding Of NLV Is Amended To Be $2,042,290. The Prior Finding Of Just Compensation In This Proceeding In The Amount Of $2,373,286 Is Affirmed; The Last Sentence Of The 5th Full Paragraph On Page 30 Of Our Decision Served August 9, 1988 Is Deleted. This Decision Is Effective August 24, 1988.	Entered August 24, 1988
National Railroad Passenger Corp.'s Notification Of Intent To Purchase Connecticut River Line	Filed August 26, 1988
Notice: A Court Action Was Instituted On Or About August 24, 1988 Involving This Proceeding Before The United States Court Of Appeals For The District Of Columbia Circuit	Entered September 1, 1988

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1631

Boston and Maine Corporation,
Petitioner,

v.

Interstate Commerce Commission, and
United States of America,
Respondents,

Windsor Minerals, Inc.,
State Of Vermont,
National Railroad Passenger Corporation,
Central Vermont Railway, Inc.,
Commonwealth Of Massachusetts,
Intervenors.

And Consolidated Cases Nos. 88-1728, 88-1731
And 88-1732

CONSOLIDATED DOCKET ENTRIES

Document	**Date**
Petitioner Boston & Maine Corp.'s Petition For Review Of An Order Of The ICC (No. 88-1631)	Filed August 24, 1988

Clerk's Order That Initial Submissions And Procedural Motions Due September 23, 1988; Dispositive Motions Due October 10, 1988	Entered August 24, 1988
Certified Copy Of Above Order And Petition For Review Was Mailed To Respondent(s)	Entered August 24, 1988
Emergency Motion Of Petitioner Boston & Maine Corp. For Temporary Stay	Filed August 24, 1988
Motion Of Petitioner Boston & Maine Corp. For Stay Pending Appeal	Filed August 24, 1988
Per Curiam Order That The Parties Comply With The Briefing Schedule Agreed To By The Parties And Set Forth In Petitioner's Stay Petition. Silberman, Williams and Sentelle, CJs.	Entered August 24, 1988
Motion Of Windsor Minerals, Inc. For Leave To Intervene In No. 88-1631	Filed August 26, 1988
Motion Of Central Vermont Railway, Inc For Leave To Intervene In No. 88-1631	Filed August 26, 1988
Motion Of National Railroad Passenger Corp. For Leave To Intervene In No. 88-1631	Filed August 26, 1988
Respondent ICC's Response In Opposition To Petitioner's Emergency Motion For Stay Pending Appeal	Filed August 26, 1988
Motion Of The State Of Vermont For Leave To Intervene In No. 88-1631	Filed August 26, 1988

Motion Of Petitioner Boston & Maine Corp. For Leave To File Reply Brief After 4:00 p.m.	Filed August 30, 1988
Intervenor State Of Vermont's Opposition to Motions Of Petitioner For Stay Pending Appeal	Filed August 31, 1988
Intervenor Windsor Minerals, Inc.'s Response In Opposition to Emergency Motion For Temporary Stay And Motion For Stay Pending Appeal	Filed August 31, 1988
Joint Opposition Of Intervenors National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Emergency Motion For Temporary Stay And Motion For Stay Pending Appeal	Filed August 31, 1988
Supplemental Record Excerpts From ICC Finance Dockets Nos. 31250 And 31259	Filed August 31, 1988
Correction To Joint Opposition Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Motions For Stay	Filed August 31, 1988
Petitioner Boston & Maine Corp.'s Reply To Briefs In Opposition To Emergency Motion For Stay	Filed August 31, 1988

Per Curiam Order That All Motions To Intervene Are Granted. The Clerk Is Directed To File Intervenors' Lodged Documents; That Petitioner's Motion For Leave To File Reply Brief After 4:00 p.m. Be Granted. The Clerk Is Directed To File Petitioner's Reply Brief; That Petitioner's Emergency Motion For Temporary Stay And Stay Pending Appeal Be Denied. Silberman and Williams, JJ.	Entered August 31, 1988
Certified Index To Record	Entered September 23, 1988
Petitioner Boston & Maine Corp.'s Initial Submissions And Docketing Statement And Notification Regarding Deferred Appendix	Filed September 23, 1988
Petitioner Canadian Pacific, Ltd.'s Petition For Review Of An Order Of The ICC (No. 88-1728)	Filed October 6, 1988
Petitioners National Railroad Passenger Corp.'s And Central Vermont Railway, Inc.'s Petition For Review Of An Order Of The ICC (No. 88-1731)	Filed October 7, 1988
Petitioner Commonwealth Of Massachusetts' Petition For Review Of An Order Of The ICC (No. 88-1732)	Filed October 7, 1988
Motion Of Railway Labor Executives' Association For Leave To Intervene In No. 88-1731	Filed October 14, 1988
Certified Index To Record (No. 88-1728)	Entered November 15, 1988

Certified Index To Record (No. 88-1731)	Entered November 16, 1988
Petitioner Commonwealth Of Massachusetts' Motion For Determination That Two Issues Are Not Ripe For Judicial Review Or Are Moot (No. 88-1732)	Filed November 22, 1988
Petitioner Boston & Maine Corp.'s Motion For Consolidation Of Cases Nos. 88-1631, 88-1728, 88-1731 And 88-1732	Filed December 1, 1988
Certified Index To Record (No. 88-1732)	Entered December 7, 1988
Clerk's Order That (1) The Motion For Consolidation Is Granted. The Clerk Is Directed To Establish No. 88-1631, *Boston And Maine Corp. v. ICC*, As Lead Docket. All Pleadings Should Include This Number And Caption. (2) The Motions For Leave To Intervene Are Granted. (3) The Clerk Is Directed To File The Lodged Responses.	Entered December 12, 1988
Response Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Commonwealth Of Massachusetts' Motion For Determination That Two Issues Are Not Ripe For Judicial Review Or Are Moot.	Filed December 12, 1988
Response Of Boston & Maine Corp. To Commonwealth Of Massachusetts' Motion For Determination Of Ripeness And Mootness.	Filed December 12, 1988

Reply Of Commonwealth Of Massachusetts To Responses To Commonwealth Of Massachusetts' Motion For Determination That Two Issues Are Not Ripe For Judicial Review Or Are Moot.	Filed December 12, 1988
Joint Letter To Court From Counsel Regarding Briefing	Filed December 22, 1988
Per Curiam Order That The Motion Of Commonwealth Of Massachusetts For Determination That Two Issues Are Not Ripe For Judicial Review Or Are Moot Be Denied. Mikva, Ruth B. Ginsburg And Silberman, CJs.	Entered March 7, 1989
Clerk's Order Regarding Scheduling Of Consolidated Cases For Oral Argument And Briefing Schedule	Entered April 12, 1989
Brief Of Petitioners National Railroad Passenger Corp., *et al.*	Filed August 9, 1989
Brief Of Petitioner Canadian Pacific, Ltd.	Filed August 9, 1989
Brief Of Petitioner Boston & Maine Corp.	Filed August 9, 1989
Brief Of Petitioner Commonwealth Of Massachusetts	Filed August 9, 1989
Corrected Brief Of Petitioner Commonwealth Of Massachusetts	Filed August 11, 1989
Supplemental Certified Index To The Record	Entered August 17, 1989
Letter Dated August 17, 1989, Informing The Court Of Designation Of Contents Of Deferred Appendix	Filed August 18, 1989

Motion Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Exceed Page Limit For Brief Due October 27, 1989	Filed September 6, 1989
Per Curiam Order That Motion Of National Railroad Passenger Corp., *et al.*, To Exceed Page Limit For Brief Is Denied	Entered September 20, 1989
Motion Of Respondent ICC For Leave To File Motion Out Of Time-To Exceed Page Limit	Filed October 6, 1989
Per Curiam Order That The Motion Of Respondent ICC Leave To File Motion Out Of Time Be Granted; The Clerk Is Directed To File Respondent ICC's Lodged Motion To Exceed Page Limit; It Is Further Ordered That The Motion For Leave To Exceed Page Limit Be Denied; Respondent ICC Is Directed To Refile Its Brief In Compliance With This Court's Rule On Or Before October 19, 1989.	Entered October 12, 1989
Respondent's Motion For Leave To Exceed Page Limit. (Filed Per Above Order.)	Filed October 12, 1989
Brief Of Respondent ICC	Filed October 17, 1989
Joint Brief Of National Railroad Passenger Corp., Central Vermont Railway, Inc., State Of Vermont, And Windsor Minerals, Inc.	Filed October 27, 1989
Brief Of Intervenor Railway Labor Executives' Association	Filed October 27, 198?

Reply Brief Of Commonwealth Of Massachusetts	Filed November 13, 1989
Reply Brief Of Boston & Maine Corp.	Filed November 13, 1989
Reply Brief Of National Railroad Passenger Corp. And Central Vermont Railway, Inc.	Filed November 13, 1989
Deferred Appendix, Vol. I, II	Filed November 29, 1989
Joint Brief Of Respondents ICC And United States Of America	Filed December 7, 1989
Final Brief Of Boston & Maine Corp.	Filed December 15, 1989
Final Reply Brief Of Boston & Maine Corp.	Filed December 15, 1989
Final Brief Of Commonwealth Of Massachusetts	Filed December 15, 1989
Final Reply Brief Of Commonwealth Of Massachusetts	Filed December 15, 1989
Final Brief Of National Railroad Passenger Corp. And Central Vermont Railway, Inc.	Filed December 15, 1989
Final Reply Brief Of National Railroad Passenger Corp. And Central Vermont Railway, Inc.	Filed December 15, 1989
Final Joint Brief Of National Railroad Passenger Corp., Central Vermont Railway, Inc., State Of Vermont, and Windsor Minerals, Inc	Filed December 15, 1989
Clerk's Order, *Sua Sponte*, Setting The Time Allotments For Oral Argument	Entered December 22, 1989

Emergency Motion Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Waive Rule 13(c) And Permit More Than Two Counsel Per Side To Argue	Filed January 17, 1990
Petitioners Commonwealth Of Massachusett's Response To National Railroad Passenger Corp./Central Vermont Railway, Inc.'s Emergency Motion To Waive Rule 13(c)	Filed January 17, 1990
Per Curiam Order: Petitioners National Railroad Passenger Corp.'s/ Central Vermont Railway, Inc.'s Emergency Motion Is Granted And Argument Shall Proceed As Follows: Petitioner Boston & Maine-15 Minutes; Petitioner Commonwealth Of Massachusetts-5 Minutes; Petitioners National Railroad Passenger Corp./Central Vermont Railway, Inc.-5 Minutes; Respondents-20 Minutes; Intervenor National Railroad Passenger Corp.-5 Minutes.	Entered January 17, 1990
Argued Before Ruth B. Ginsburg, Buckley And Sentelle, Circuit Judges (Consolidated Cases)	January 18, 1990
Letter From Counsel For Boston & Maine Corp. Advising Of Additional Authority Pursuant To FRAP 28(j)	Filed March 30, 1990
Opinion For The Court Filed By Circuit Judge Buckley	Entered August 10, 1990

Concurring Opinion Filed By Circuit Judge Ruth B. Ginsburg	Entered August 10, 1990
Judgment For The Court That The Petition For Review Is Granted In Part And Dismissed In Part, In Accordance With The Opinion For The Court Filed Herein This Date.	Entered August 10, 1990
Mandate Order	Entered August 10, 1990
Petitioner Boston & Maine Corp.'s Bill Of Costs	Filed August 24, 1990
Limited Opposition Of Commonwealth Of Massachusetts To Boston & Maine Corp.'s Bill Of Costs	Filed August 31, 1990
Transcript Of Oral Argument Proceedings	Entered September 4, 1990
Objections Of Respondents ICC And United States Of America To Bill Of Costs	Filed September 5, 1990
Petition Of Respondents ICC And United States Of America For Rehearing With Suggestion For Rehearing *En Banc*	Filed September 24, 1990
Petition Of National Railroad Passenger Corp., Central Vermont Railway, Inc., The State Of Vermont, And Windsor Minerals, Inc. For Rehearing And Suggestion For Rehearing *En Banc*	Filed September 24, 1990
Letter From Counsel For National Railroad Passenger Corp. Advising Of Additional Authority Pursuant To FRAP 28(j)	Filed October 29, 1990

Motion Of Respondents ICC And United States Of America For Leave To File Supplemental Memorandum In Support Of ICC Petition For Rehearing With Suggestion For Rehearing *En Banc*	Filed December 4, 1990
Motion Of National Railroad Passenger Corp., Central Vermont Railway, Inc., The State Of Vermont, And Windsor Minerals, Inc. For Leave To File Supplement To Petition For Rehearing And Suggestion For Rehearing *En Banc*	Filed December 4, 1990
Per Curiam Order That The Motions Of ICC And National Railroad Passenger Corp., *et al.* For Leave To File Supplements To The Petitions For Rehearing And Suggestions For Rehearing *En Banc* Are Granted. The Clerk Is Directed To File The Lodged Supplements.	Entered December 12, 1990
Opposition Of Boston & Maine Corp. To The Petitions For Rehearing And Suggestions For Rehearing *En Banc*	Filed December 27, 1990
Per Curiam Order Of The *En Banc* Court Denying Suggestions For Rehearing *En Banc*	Entered February 1, 1991
Per Curiam Order Denying Petitions For Rehearing	Entered February 1, 1991
Per Curiam Opinion For The Court Denying Petitions For Rehearing	Entered February 1, 1991
Separate Statement Filed By Circuit Judge Ruth B. Ginsburg	Entered February 1, 1991

Judgment For The Court That The Petitions For Rehearing Are Denied, In Accordance With The Opinion For The Court Filed Herein This Date	Entered February 1, 1991
Motion Of Respondents ICC And United States Of America To Stay Issuance Of The Mandate	Filed February 6, 1991
Motion Of National Railroad Passenger Corp. And Central Vermont Railway, Inc. To Stay Issuance Of The Mandate	Filed February 7, 1991
Per Curiam Order That Upon Consideration Of The Motions For Stay Of Mandate It Is Ordered That The Clerk Is Directed To Withhold Issuance Of The Court's Mandate Through March 11, 1991. Ruth B. Ginsburg, Buckley And D.H. Ginsburg, CJs.	Entered February 25, 1991
Notification To Court By National Railroad Passenger Corp. And Central Vermont Railway, Inc. Of Filing Of Petition For *Certiorari*	Filed March 11, 1991
Notice To Court Of Filing Of National Railroad Passenger Corp./ Central Vermont Railway, Inc. Petition For *Certiorari* Dated March 11, 1991 From U.S. Supreme Court (No. 90-1419)	Filed March 18, 1991
Application Of Respondents ICC And United States Of America For An Extension Of Time Within Which To File Petition For A Writ Of *Certiorari*	Filed April 24, 1991

Notification To Court Of Filing Of ICC/United States Of America Petition For *Certiorari* Dated May 16, 1991 From U.S. Supreme Court (No. 90-1769)

Filed
May 21, 1991

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

Finance Docket No. 31250

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)—CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

VERIFIED STATEMENT OF JAMES L. LARSON

My name is James L. Larson. I reside at 12820 Westside Road, Manassas, Virginia. I am employed by the National Railroad Passenger Corporation ("Amtrak") as Assistant Vice President - Contract Administration and Operations Planning in Washington, D.C.

A. Personal Qualifications

I joined Amtrak in 1973 and have served in my present position since 1975. Prior to joining Amtrak I was employed for 20 years in the Operating Department of the Chicago and North Western Railway/Transportation Company. The preponderance of the time I was with the Chicago and North Western was in line management in transportation supervision.

In my present position, I am responsible for the negotiation and administration of Amtrak's operating agreements with the railroads over which Amtrak passenger trains operate throughout the United States, and with commuter authorities and freight railroads operating on Amtrak's rail lines. I am also responsible for operations

planning for all operations outside of the Northeast Corridor. I serve as chairman of Amtrak's transportation and engineering team that evaluates all potential rail lines for the implementation of rail passenger service. This assignment, now in its tenth year, has resulted in the evaluation of approximately 50,000 miles of railroad routes throughout the United States. I also developed and negotiated the facilities plan used by Amtrak and Conrail for Northeast Corridor operations. In addition to the negotiation of operating agreements, I am also involved with the negotiation of schedules, schedule modifications, and the implementation of new routes for Amtrak trains, including capital expenses as well as operating requirements. I am thoroughly familiar with Amtrak operations throughout the United States including the former operation of Amtrak's Montrealer over the rail Lines of the Boston and Maine Corporation ("B&M"), and Central Vermont Railway, Inc. ("CV").

B. Purpose Of Statement

Amtrak's Montrealer is not currently operating north of Springfield, Massachusetts. Service through western Massachusetts, Vermont, New Hampshire and to and from Montreal, P.Q. was discontinued on April 5, 1987 due to an impending Connecticut River flood. Subsequently, on April 20, 1987, I participated in an inspection of the rail line between Springfield, Massachusetts and Windsor, Vermont with Mr. Herbert F. Longhelt, Amtrak's Deputy Chief Engineer and Boston and Maine representatives. At the conclusion of that trip, Mr. Longhelt and I concluded that the condition of the rail line between Springfield and East Northfield, Massachusetts and between Brattleboro and Windsor, Vermont had deteriorated to such an extent that we could not recommend restoration of passenger train service due to the extent and severity of the slow orders. This was the direct result of the refusal by B&M and its parent, Guilford Transportation Industries ("Guilford"), to maintain the B&M trackage on the Connecticut

River Line between Springfield and Windsor, Vermont to a standard of utility that would permit reasonably expeditious and marketable schedules for passenger train operations.

The Montrealer was cancelled after nearly two years of effort by Amtrak to persuade B&M and Guilford officials to honor commitments to Amtrak made by their predecessors in 1977 and assumed by them when they warranted to this Commission in 1981 and 1982 that their acquisition of the B&M and the Delaware & Hudson Railway ("D&H") would have no adverse impact on rail passenger service.[1] Those unsuccessful efforts, as well as the failed attempt of last summer to reach a basis upon which $5 million of Federal grant money could be expended to upgrade the rail line, persuaded me that there was no prospect for restoring reliable, efficient and economical passenger train service on this line through voluntary agreement with B&M or Guilford. I believe that the Montrealer will never run again unless ownership of the Brattleboro to Windsor segment of the Conn River Line[2] changes.

This verified statement will describe Amtrak's reasons for resorting to use of its authority under Section 402(d) in this case. I will explain why there should be no delay by this Commission in issuing an order requiring B&M to convey the interests in the Conn River Line sought in this proceeding. B&M cannot sustain its burden with respect to either of the two narrow issues, both of which it must

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[1] *See* Application, *Guilford Transportation Industries, Inc. - Control - Boston & Maine Corporation, Debtor and Maine Central Railroad Company*, ICC Finance Docket 29720 (Sub No-1), Exhibit A-16 at 87-88 and Exhibit A-17 at pp. 60-61; and Application, *Guilford Transportation Industries, Inc.-Control-Delaware & Hudson Railway Co.*, ICC Finance Docket 29772, Exhibit A-17 at 93.

[2] "Conn River Line" or "Line" refers specifically to that portion of the Connecticut River Line between Brattleboro and Windsor, Vermont which is owned by B&M and is the subject of a joint trackage agreement between B&M and CV.

establish if it is to rebut the presumption of Amtrak's need for the property. B&M's freight operations will be improved—not impaired—as a result of this acquisition. Moreover, Amtrak has no alternative for routing of the Montrealer and must acquire the interests specified in the Section 402(d) Application if the Montrealer is to operate again.

I will also explain Amtrak's plan for restoring Montrealer service once the interests in the Conn River Line are acquired and our arrangements with CV which are central to that process. Herbert Longhelt, Amtrak's Deputy Chief Engineer, will describe the results of his inspections of the Line over the past several years for purposes of confirming the rapidly deteriorating condition of the Line. Amtrak's valuation experts from R.L. Banks and Associates will explain their study of the Conn River Line and present their estimate of the compensation Amtrak should be required to pay for the interests in the Line. Finally, Mr. Phillip C. Larson, General Manager of CV, will confirm CV's readiness and willingness to live up to its commitments to Amtrak under the various agreements between the parties, including the obligation to honor the terms of the trackage rights agreement which will permit B&M to continue its existing freight operations over the Line. Mr. Phillip Larson will also provide certain operating information relating to the CV and B&M use of the Conn River Line, which supports the reasoning and logic of the valuation study.

C. The Need To Restore The Montrealer And To Resort To Section 402(d)

Amtrak commenced daily, two way Montrealer service between Washington and Montreal through western Massachusetts, Vermont and New Hampshire in response to public demand and congressional direction in September, 1972. Prior to its discontinuance in April 1987, the Montrealer attracted a significant ridership, largely made up

of passengers seeking access to the Vermont and New Hampshire resort areas, students, visitors to the cities and towns located along its route, local residents for transportation to other points on the Amtrak system, as well as passengers desiring international service to and from Montreal. The train, while never profitable for Amtrak, did stay within congressionally imposed cost parameters. It was the only rail passenger service operating in either Vermont or New Hampshire.

Congress has expressed its desire for Amtrak to restore Montrealer service north of Springfield, Massachusetts by appropriating $5 million expressly for that purpose in July 1987 in Public Law 100-71. Amtrak is committed to fulfilling this congressional mandate, but has concluded that the only way to do so is through use of its authority under Section 402(d) of the Rail Passenger Service Act.

Amtrak offered to acquire certain Conn River Line property interests from Guilford as detailed in a letter dated March 18, 1988. A copy of that letter is attached as Exhibit 1 to this Statement. Guilford's response came by letter dated March 29, 1988 from its CEO, David A. Fink. A copy of his letter is attached as Exhibit 2.

Mr. Fink asserts that Amtrak does not need to acquire the Conn River Line interests subject to this Application because now Guilford is prepared to deal in good faith, to upgrade the Line with Federal funds and to permit the Montrealer to operate over B&M lines, provided Amtrak increases the level of compensation to reimburse B&M for the costs imposed by maintaining the Line for Amtrak's operation. Mr. Fink went on to assert that Amtrak "unilaterally and abruptly decided to cease its operation of the Montrealer in April, 1987 . . . ." Amtrak responded the following day by inviting Mr. Fink to inform us immediately if we were to read his letter as anything other than a rejection of our March 18, 1988 offer. *See*, Exhibit 3. Amtrak has received no further response.

The following section of my statement will describe the lengths to which Amtrak has gone to preserve the Montrealer in conjunction with Guilford. Amtrak has concluded it cannot do business with Guilford. Fortunately, this Commission need not delay its deliberations to resolve whether in fact this is the case. The Rail Passenger Service Act permits Amtrak to condemn these property interests unless Guilford can show that the acquisition will impair their operations and that Amtrak can acquire alternative property for routing the Montrealer consistent with its obligation to provide efficient and economical service.

D. The Conn River Line's Significance To The Montrealer And How It Was Permitted To Fall Into Disrepair Under Guilford Ownership

1. Route Of Montrealer

Since the commencement of service in 1972, Amtrak operated the Montrealer along the Northeast Corridor between Washington and Springfield, Massachusetts. North of Springfield the train operated over B&M trackage to East Northfield, Massachusetts. The route then followed the CV trackage between East Northfield and Brattleboro, then the Conn River Line and then a CV segment between Windsor and White River Junction. The train operated under the control of B&M over the entire segment between of [*sic*] East Northfield and White River Junction even though B&M owned only the portion of the line between Brattleboro and Windsor, Vermont. The B&M also provided the train dispatching between East Northfield, Massachusetts and White River Junction, Vermont including the two short segments of CV owned tracks. CV assumed control of the Montrealer at White River Junction for movement north through Vermont to a point near the Canadian border where control of the train was assumed by the Canadian National Railway Company. A map of the Conn River Line and a regional map showing the line

in relation to other lines in the area are attached as Exhibits 4 and 5 to this statement.

2. Agreements Governing Operation Over Connecticut River Line

The agreement governing operation of the Montrealer between Springfield and White River Junction was originally executed in 1973 when B&M was in the process of bankruptcy reorganization. The original agreement provided for special payments to assist in the upgrading of the line to improved standards. In 1977, with B&M still in reorganization, I negotiated a substitute operating agreement with B&M's then Chief Operating Officer, Alan Dustin, which governed the operation of the Montrealer until its termination in 1987. The Operating Agreement, in the level of utility provision (Section 7.2), specified the passenger train speeds, by milepost location. B&M agreed to maintain its rail lines to permit passenger trains to operate "at not less than" the prescribed speeds subject to permanent local operating restrictions.

The agreement also provided for maintenance payments significantly higher than Amtrak's normal payments in recognition of the fact that the tracks were maintained to an improved level of maintenance. Even so, in 1977 the Connecticut River Line was B&M's second most important freight route, providing a through route for traffic moving between Canada and central New England and beyond.

The train schedules agreed to in the 1977 B&M Operating Agreement covering operation of the Montrealer between Springfield and White River Junction were those effective October 31, 1976. A copy is attached as Exhibit 6. This schedule was the basis for reporting on-time performance and for determining the amount, if any, of performance payments earned each month by B&M for operating the service on time. There were a number of factors to be considered in the determination of whether a particular train was on time, but it is significant to note

that B&M received an allowance for the time a train was delivered late by a connecting carrier at either Springfield or White River Junction, and the performance reported was actually based on whether the train made scheduled contract running time over the B&M segment of its route.

The October 31, 1976 schedules show a running time from departure at the initial B&M station (either White River Junction or Springfield) to arrival at the final B&M station of three hours twenty minutes for northward Train No. 60 and three hours fifteen minutes for southward Train No. 61. Subsequently, some minor schedule changes have been made.

Summarized in Exhibit 7 is the Contract On-Time Performance of the Montrealer over the B&M between Springfield and White River Junction by months for the years 1975 through 1986. A review of the on-time performance shows clearly that the contract schedules were realistic and achievable and that B&M generally operated the Montrealer at an acceptable level of performance for a number of years. In fact, during several years, B&M's on-time performance exceeded the Amtrak System Average.

3. Guilford Acquisition Of Conn River Line And The Impact On Service

Guilford acquired B&M on June 30, 1983 and the Delaware and Hudson Railway ("D&H") in January 1984. With the D&H's alternative route for Canadian traffic west of Lake Champlain, the Conn River Line lost the importance as a freight line to the Guilford system that it once had for B&M. During the period which Guilford's applications for control were before the Commission and shortly thereafter, the performance of the Montrealer was inconsistent. Overall, on a year-to-year basis, it was below the performance for the years 1977 through 1981.

During 1985, on-time performance deteriorated during the summer months due primarily to delays from slow

orders and the result of compounded delays from meeting the opposing Montrealer.[1] Also during that period, Amtrak began to hear of Guilford's plans to divert Canadian-New England freight traffic from the Conn River Line to the alternate route via the D&H.

In my routine contacts with B&M's Vice President-Operations, S.B. Culliford, who was also designated by B&M as their NRPC Operations Officer (Amtrak liaison), I expressed my concerns over conditions on their segments of the Connecticut River Line. I also personally made a trip over the line in the locomotive cab of Train No. 60 and arranged for two Amtrak officers to make a Hy-Rail Inspection of the line with a B&M engineering officer. The Amtrak officers were E.C. Rudolph, Director of Engineering, and A.L. Clark, Director of Contract Operations. Mr. Rudolph's October 22, 1985, report is included as Exhibit 8.

The most serious of the ten existing slow orders was a 5.8 mile long, 10 mph restriction (subsequently raised to 15 mph for passenger trains). This slow order was primarily the result of tie damage from a derailed freight car wheel which severely damaged numerous ties. I was advised by Messrs. Rudolph and Clark that the B&M engineering officer stated that his request for ties to permit removal of this slow order has been denied. During this trip, the diversion of B&M freight traffic from the Connecticut River Line was confirmed. It was apparent to me that B&M had adopted a policy to defer maintenance, allowing the condition of the line to deteriorate.

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[1] The schedules of the Montrealer, since it was inaugurated in October 1972, have required the northbound and southbound trains to meet each night on the B&M's Connecticut River Line, which is essentially single track. Although the schedules provide for the meeting under normal circumstances, a late train in one direction can cause further delay to a train in the opposite direction.

Amtrak arranged a meeting with senior Guilford/B&M officers in New York City on December 6, 1985. The Guilford officers were Mr. D.A. Fink, Chairman, President & Chief Executive Officer and Mr. G.E. Hartsoe, Executive Vice President & Chief Operating Officer. At this meeting, Amtrak expressed its serious concerns as to both the present condition and the future of the Connecticut River Line and its impact on the operations of the Montrealer. Amtrak also made the point that B&M was not in compliance with its contractual obligations per its 1977 Agreement with Amtrak.

The Guilford/B&M response was that the Connecticut River Line did not require additional work to meet B&M's needs for freight train operations, that no significant maintenance program was planned for the line and that if Amtrak was concerned about the condition of the line, Amtrak should consider purchasing the line. The Guilford officers did not indicate that they had any plan which would restore the line to its former condition.

On-time performance of the Montrealer continued to be unsatisfactory during January and February 1986, at roughly the same performance levels as 1985. In March, B&M became embroiled in a strike which had its origins on Guilford's Maine Central Railroad. For a period of time, the Montrealer did not operate north of Springfield. Service was restored on May 24, 1986. Not one train met its contractually agreed upon schedule after April 1986!

Amtrak exhibited patience with B&M following the strike and their efforts to resume service. It appeared reasonable to give B&M the benefit of the summer work season to improve conditions on the Connecticut River Line. However, with no apparent improvement being made, I arranged for a member of my staff, Mr. G.A. Forero, to go to B&M's headquarters in North Billerica, MA in September 1986 to quantify the slow order situation. His report, dated October 20, 1986, is enclosed as Exhibit 9. This

report shows that speed restrictions on the Connecticut River Line, as shown in a monthly report of temporary speed restrictions from the office of the Vice President of Engineering, increased from no mileage restricted on January 21, 1985, to 14.9 miles on June 23, 1986, to 91.4 miles on July 21, 1986 to 93.8 miles as of September 26, 1986. The above mileage, to some degree, includes trackage under a speed restriction which is not lower than speed agreed to in the 1977 Agreement.

The Forero report also contains a tabulation of trackage showing the location and extent of speed restrictions in effect September 29, 1986 along the Connecticut River Line, (as shown in the Temporary Speed Restriction Summary contained in Guilford's Administrative Message No. 926). This tabulation shows that 81.4 track miles out of a total (including double track) of 107.0 track miles, or 76.1%, were slow ordered below speeds agreed to by B&M in the Amtrak/B&M 1977 Operating Agreement. Also tabulated are the miles of track restricted to various speeds. It shows 20.2 miles restricted to a maximum speed of 10 mph and 9.0 miles restricted to a maximum of 15 mph.

In like manner, a similar evaluation of slow orders performed just after cessation of the Montrealer showed a total slow order mileage of 83.0 miles (or 77.6%) were slow ordered below the contract speeds. The slow orders included 1.0 mile at 5 mph, 24.8 miles at 10 mph, and 6.0 miles at 15 mph. At that time, Amtrak trains could only average 25.85 mph between Springfield and East Northfield and 17.27 mph between Brattleboro and Windsor. The overwhelming impact of such slow trackage on passenger train performance on the 123 mile route between Springfield and White River Junction was highly detrimental to the performance of the Montrealer. Clearly, operating passenger trains at average speeds of 26 mph and 17 mph is unacceptable from an operating standpoint and not competitive from a marketing standpoint.

4. Effect Of Slow Orders

The on-time performance of the Montrealer in the first three months of 1981 ranged between a very satisfactory 95.2% and a moderately acceptable 78.6%. I have tabulated in Exhibit 10 the slow orders, as compared to Amtrak contract speeds, existent in March 1981, versus those in effect April 20, 1987. I have also developed a "severity index"[4] to compare the relative impact upon train performance of reduced speeds and lengths of various speed restrictions.

In March 1981, Exhibit 10 shows 5.8% of the B&M track miles between Brattleboro and Windsor are slow ordered. That results in a severity index of 87. The performance at that time indicated that the then existing level of slow orders was generally acceptable, *i.e.*, time lost was less than recovery time built into the schedule and on-time operation was normally achieved. In comparison, slow orders in effect on this line segment on April 20, 1987, totaled 98.6% of the track miles, computing to a 2501 severity index. Comparing April 1987 with March 1981 indicates an increase in the magnitude of slow order restrictions over that 61-month period 17 times greater as measured by track miles or nearly 29 times greater as measured by the severity index.

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[4] The severity index is defined as the sum of the products of the lengths of restrictions times speed differences (contract vs. restriction) per 100 track miles, as shown in the following formula:

$$SVI = \Sigma \frac{100 \left(\Delta \text{ speed} \right) \times L}{TM}$$

Where: SVI = Severity Index

Δ Speed = Timetable speed less slow order speed

L = Length of slow order in miles

TM = Total Track miles in segment evaluated

Since last year the line segment between Brattleboro and Windsor has deteriorated even further with 30.7 of the 48.5 miles subject to 10 mph speed restrictions as of March 3, 1988. The severity index as of that date was 3045.

As a comparison, we calculated the severity index for the Central Vermont maintained rail lines between East Northfield and St. Albans, Vermont, 141.5 miles. On April 20, 1987, the CV Severity Index was 5, and on March 3, 1988, the CV index was zero.

When one focuses on the fact that on-time performance was zero percent between May, 1986 and April, 1987 it becomes possible to realize the terrible impact of these extensive slow orders on the performance of the Montrealer.

Exhibit 11 graphically depicts the running time required to operate Train No. 61 from White River Junction to Springfield with the speed restrictions in effect in March 1981 versus those in effect in April 1987. It shows that the southbound Montrealer begins to lose time as soon as it reaches the B&M maintained track at Windsor Interlocking and requires 30 additional minutes into Bellows Falls, Vermont. Extensive slow orders on the B&M between Bellows Falls and Brattleboro resulted in Train No. 61 requiring 103 additional minutes to reach Brattleboro from White River Junction as compared to early 1981. Arrival in Springfield required 129 additional minutes, an increase in required running time from 191 minutes to 320 minutes or an increase of 67%. Based upon March 1988 speeds, the negative impact upon schedule performance would be even greater.

Amtrak informed Guilford in January 1987 that the condition of the Connecticut River Line was unacceptable and that is was imperative that Amtrak receive Guilford's commitment to increase maintenance during the 1987 maintenance season to remove the slow orders on a priority

basis. *See* Exhibit 12 to this Statement. Although the letter asked for a reply by the end of the month, it was not until March 23, 1987 that B&M informed Amtrak that during 1987 there would be no significant expenditures on the Conn River Line to eliminate existing speed restrictions and that, "[n]o appreciable increase in track speed is anticipated." *See* Exhibit 13. With no improvement in conditions forthcoming, Amtrak reluctantly concluded that the line was not suitable for passenger train operations north of Springfield after my April 20, 1987 inspection.

Exhibit 14 is my report of April 22, 1987 to Amtrak's management summarizing the results of the April 20 inspection trip and concluding that the B&M rail line condition would not permit restoration of Montrealer service. Mr. Longhelt explains from the perspective of an experienced railroad engineering officer the deterioration of the Line while under Guilford control in his Verified Statement and provides an update of conditions.

E. Amtrak's Evaluation Of Alternative Routes

Subsequent to the decision that the Connecticut River Line was not in a satisfactory condition for passenger train operations, I performed an analysis of Amtrak's routing options for restoring Montrealer service. The only two possible alternate routes that could serve the State of Vermont were identified as follows:

Alternate Route 1

Boston and Maine Connecticut River Line between Springfield and East Greenfield, Massachusetts; B&M Freight Main Line between East Greenfield, Massachusetts, and Hoosick Junction, New York; thence over the Vermont Railway between Hoosick Junction, New York and Burlington, Vermont and Central Vermont Railway between Burlington and Essex Junction, Vermont.

Alternate Route 2

Boston and Maine-Central Vermont Railway Connecticut River Line between Springfield, Massachusetts, and Bellows Falls, Vermont; thence over the Green Mountain Railroad to a connection with the Vermont Railway at Rutland, Vermont. This route would then follow the same route as Alternate Route 1 using the Vermont Railway between Rutland and Burlington, Vermont and the Central Vermont Railway between Burlington and Essex Junction, Vermont.

The alternate routes are shown on Exhibit 15. Both the Green Mountain Railroad and the Vermont Railway were contacted by Amtrak to determine their current status and speeds. In addition, Amtrak reviewed the operating timetables of both railroads and determined that neither alternative was viable as an alternative route.

Alternate Route 1 still required operating over a substantial portion of the slow ordered Connecticut River Line between Springfield and East Greenfield. The Vermont Railway line between Hoosick Junction and North Bennington is restricted to 10 mph and North Bennington to Arlington is restricted to 25 mph, while the balance of the Vermont Railway line is restricted to 40 mph. The old non-controlled cooled, jointed rail on the Vermont Railway line, which is unsignalled, was also an area of concern. We concluded that the circuity of the route, as well as the slow operating speeds, would actually result in schedules that would be longer than the slow ordered Connecticut River Line.

Alternate Route 2 posed similar problems. Access to the Green Mountain Railroad at Bellows Falls would require operating over approximately 70 percent of the slow ordered Connecticut River Line north of Springfield, Massachusetts, before reaching Bellows Falls. The Green Mountain Railroad restricts passenger trains to 30 mph between Bellows Falls and Rutland, while the Vermont Railway is restricted to 40 mph between Rutland and Bur-

lington. The Green Mountain Railroad also has non-controlled cooled, jointed rail similar to the Vermont Railway and is also unsignalled. Again, we concluded that this alternate route would also be longer in time than the existing slow ordered Connecticut River Line.

Both alternatives would require significant operations over the Connecticut River Line before reaching the alternative connections at Greenfield or Bellows Falls.

Using a reasonable engineering estimate that $250,000 per mile as the normal cost for rail replacement, it can be seen that the need to replace 100 or more miles of rail becomes cost prohibitive, not to mention the cost of other upgrading that, most likely, would be essential before satisfactory passenger train speeds comparable to those to be obtained on the restored Connecticut River Line could be attained.

This left Amtrak with pursuing restoration of the Montrealer passenger train service over a restored Connecticut River Line as the only viable alternative.

F. Unsuccessful Efforts With Guilford To Reestablish Montrealer Service

Amtrak pursued two courses with Guilford to get the train back in operation. On April 27, 1987, Amtrak initiated an arbitration proceeding before the National Arbitration Panel seeking damages and specific enforcement of the 1977 operating agreement between Amtrak and B&M. B&M responded by notifying Amtrak on May 6, 1987 of its intention to terminate the agreement, and by seeking to enjoin the arbitration proceeding in actions in the United States District Courts in both Boston and the District of Columbia.

Although B&M's motions to stay the arbitration proceedings have been denied, B&M is still pressing an appeal in the Court of Appeals for the District of Columbia. After

almost a year of litigation, the arbitration proceeding is still in its preliminary stages.

The second course was more conciliatory, but had the same result. Congress appropriated $5 million in July 1987 to enable Amtrak promptly to begin repair work on the Connecticut River Line in order to permit restoration of Montrealer service north of Springfield. I attempted to initiate discussions with B&M officers over the appropriate use of these funds.

A meeting was convened at Guilford's headquarters in North Billerica, Massachusetts on July 20, 1987, where I met with David Fink and his key staff members. Because Amtrak was considering routing alternatives south of East Northfield for the Montrealer, we indicated that we were interested in determining whether there was a basis upon which Guilford would agree to perform the work on the segment between Brattleboro and Windsor or permit a third party to do the work. Mr. Fink made it clear that if there was to be any work performed, it would have to be done by Guilford. He also indicated at that meeting that Guilford was currently conducting a study regarding possible abandonment of the Connecticut River Line between Deerfield, Massachusetts and Wells River, Vermont which would have included the segment between Brattleboro and Windsor.[5] Mr. Fink emphasized to me that Guilford was unwilling to accept any of the funds appropriated for the rehabilitation until it had an agreement with Amtrak covering the future maintenance costs of the line. B&M/Guilford did not have an estimate of the cost of rehabilitating the line. We scheduled a second meeting to be held on July 29, 1987 at which time the cost of rehabilitation and the terms of a new operating agreement were to be discussed. A copy of my memorandum to D.F.

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[5] The Line was subsequently identified on B&M's System Diagram Map as a Category 1 initial candidate for abandonment and remains so identified to this date.

Sullivan, Amtrak's Vice President-Operations and Maintenance, is attached as Exhibit 16.

Guilford cancelled that meeting on July 27, 1987 purportedly because the word of our previous meeting had been disclosed in a press report. My letter of July 29, 1987 to B&M's Vice President-Transportation expressed my regret over the cancellation of the meeting and assured him that Amtrak was not responsible for the public disclosures. I concluded by requesting that Mr. Stoetzel specify the basis, if any, he would be willing to meet with Amtrak. A copy of my July 29 letter is attached as Exhibit 17. A month passed and Mr. Stoetzel responded that B&M "sees no purpose in holding another meeting on the subject of the Montrealer . . .", although he closed the letter with a somewhat inconsistent indication that B&M would be "happy" to meet. A copy of Mr. Stoetzel's letter dated September 1, 1987 is attached as Exhibit 18. By the time of Mr. Stoetzel's letter, Amtrak has concluded that no agreement could be reached with Guilford so we did not attempt to resolve the ambiguity. No subsequent meetings were held with Guilford.

G. Amtrak's Arrangements With CV

Amtrak turned to CV to develop a plan to restore the Montrealer because CV's performance under its agreement with Amtrak for operating the Montrealer between White River Junction and the Canadian border had been exemplary. The trackage was maintained to Amtrak's standards and CV's on-time performance regularly exceeded 95 percent. CV's freight operations are dependent upon the Conn River Line, and it is reasonable to assume that CV will share Amtrak's interest in retaining a high level of maintenance on the Line once it is upgraded with Federal funds.

On March 18, 1988, Amtrak and CV reached three separate agreements governing various aspects of our relationship. One agreement deals with the acquisition of the

Conn River Line interests by Amtrak pursuant to either voluntary agreement with B&M or an order issued by this Commission under Section 402(d). Amtrak will convey these interests to CV upon reimbursement by CV of the compensation ordered by the Commission or agreed to by B&M. CV has committed an amount of funds which Amtrak believes exceeds the level of just compensation which this Commission would order be paid to B&M. However, those funds are limited and should the Commission order compensation in excess of the level of compensation supported by Amtrak's valuation experts, Amtrak has retained the option of not proceeding to acquire the property. Once CV acquires the property from Amtrak it will rehabilitate the Line to Amtrak's standards, utilizing a portion of the Federal funds appropriated for that purpose.

A second Amtrak/CV agreement provides for the rehabilitation of the Line by upgrading it to a level permitting speeds up to 59 mph between East Northfield and White River Junction. The upgrading work will be performed under Amtrak supervision, and payments will be approved only to the degree work is approved by Amtrak. The maximum contract price for the work north of East Northfield is $3.1 million, including installation of necessary communications and signal equipment to permit the CV to perform the train dispatching function. Amtrak will be providing equipment and materials which will reduce the out of pocket expense of the work below that figure. A serious concern is the continued degradation of the line pending resolution of the issues with limited funds allocated for rehabilitation of the Line which could prove inadequate.

The work on the Conn River Line is expected to be completed within one work season from the date CV obtains access to the property, depending upon weather and availability of materials. However, track upgrading cannot normally be performed during the winter months when the ground is frozen, generally from early November until

about April 1. I am informed that CV has had discussions with the Brotherhood of Maintenance of Way Employees and obtained their cooperation in assembling two large work gangs to complete the work as promptly as possible with flexible work rules.

The Montrealer will commence operations upon the completion of the upgrading work pursuant to an operating agreement with CV. Amtrak and CV have agreed upon a twenty year contract for the continued operation of the Montrealer, and CV has agreed to maintain the rail line to Amtrak's standards for the entire period or as long as the passenger train continues to operate during that period.

Amtrak is evaluating the options for routing the Montrealer south of East Northfield. The agreements with CV provide Amtrak the flexibility of selecting from among three potential routes. Amtrak is in the process of negotiating arrangements with the Commonwealth of Massachusetts which could result in the routing of the Montrealer over B&M trackage between Springfield and East Northfield. Our agreements with CV provide for alternative routing via Palmer, Massachusetts (utilizing Conrail trackage between Springfield and Palmer) or via New London, Connecticut, where CV's line intersects with Amtrak's Northeast Corridor line. If the arrangements with Massachusetts are not finalized, the train will be operated over one of these alternative routes.

H. B&M Will Suffer No Impairment Of Service

Amtrak has obtained CV's commitment to be bound by a trackage rights agreement which will permit B&M to continue its present operations over the Line once the property interests are conveyed to CV. A copy of that proposed agreement is attached hereto as Exhibit 19. Amtrak is prepared to accept this agreement as a term or condition which the Commission might set in its order requiring conveyance of the Line. With this agreement in

place, there will be no impairment of B&M freight operations. Indeed, those operations should benefit as a result of the improved track condition.

The agreement gives B&M full and exclusive[6] access to its existing shippers on the Line, and permits B&M to continue its interchange with railroads which intersect with the Line. CV will also retain the right to interchange with these carriers. There is no fixed or interest rental for use of the Line, and B&M will not pay for the investment of Federal funds which will be made.

Of course, the condition of the Line will improve vastly. With zone speeds at 40 mph for freight service and restoration of a siding which has been taken out of service, B&M operations will benefit. B&M crews operating out of East Deerfield, Massachusetts should no longer risk having to be relieved under the Hours of Service Act.[7]

There will be no problem of congestion on the Line. B&M operated three trains per week in each direction prior to the service disruption of last fall. CV will operate one or two trains per day in each direction over this route, and Amtrak will operate one train a day in each direction. The Line is presently equipped with centralized traffic control signalling between Brattleboro and Windsor and has sufficient capacity to handle not only the proposed service, but also a significant increase in traffic as well.

It is essential that the right to dispatch the trains between East Northfield and White River Junction on the

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[6] CV will obtain the right to serve new shippers or facilities on the Line because it is highly unlikely that such facilities would otherwise locate along the Line due to the generally deteriorated condition of the track and with the possibility of future line abandonment. CV would obtain the right to jointly serve existing shippers on the Line in the event B&M's service deteriorates below levels specified.

[7] The Hours of Service Act prohibits train and engine crew employees from working more than 12 hours in any 24 hour period.

Conn River Line is acquired along with the physical assets between Brattleboro and Windsor. These rights must be acquired because adherence to schedules can only be insured by placing the dispatching authority with the party obligated to provide the service. In addition it is imperative that the train dispatching must be under the control of the party responsible for the track upgrading and continuing maintenance of way work. Access to the track for maintenance work is an essential element not only in the performance of the work but in controlling maintenance costs as well. The train dispatcher is the one person who controls access to the Line. The dispatching rights will be assigned by Amtrak to CV, and the proposed trackage rights agreement provides for nondiscriminatory handling of all traffic on the Line. *See* ¶ 7.4 of Exhibit 19.

I. There Is No Alternative Route Over Which Montrealer Service Can Be Restored.

The only option available to Amtrak for providing rail service to the region served by the Montrealer, consistent with our statutory mandate to provide efficient and economical passenger service, is to acquire B&M's interests in the Conn River Line. As we previously indicated the alternative rail routes for operation through Vermont are not viable for intercity passenger service and would further lengthen schedules even beyond those now required by the unacceptably slow Conn River Line. Acquisition of property from non-railroad owners and construction of an alternative route is not an option because of the excessive costs and the impossibility of providing efficient and economical passenger operations under such circumstances.

J. Conclusion

This Application represents an extraordinary step by Amtrak. However, the absence of suitable alternate routes makes this action necessary if rail passenger service is to be restored to northern New England. Guilford and B&M have indicated that the reduced maintenance on the line

is adequate to meet their operating needs. Unfortunately, Amtrak cannot successfully operate over a rail line in that condition. I believe, without the slightest hesitation, that the program we have outlined for restoration of the Montrealer serves the public interest, fulfills Amtrak's statutory mandate and complies fully with §402(d). In addition, it provides for an improved rail line that will benefit not only Amtrak but all freight carriers on the line. I hope that these facts are obvious from this Application and that the Commission can move promptly to permit the restoration work to commence.

VERIFICATION

City of Washington)
) ss:
District of Columbia)

James L. Larson, being duly sworn, deposes and states that he has read the foregoing statement, knows the facts asserted therein, and that the same are true and correct to the best of his knowledge and belief.

Executed at Washington, D.C., this [4th] of [April], 1988.

[Signature]
James L. Larson

Subscribed and sworn to before me this
[4th] day of [April], 1988.

[Signature]
Notary Public
My Commission Expires [Date].

[Exhibit 1 to Larson Verified Statement]

National Railroad Passenger Corporation, 400 North Capitol Street, N.W., Washington, D.C. 20001 Telephone (202) 383-3000

AMTRAK [Logo]

March 18, 1988

CERTIFIED MAIL

Mr. David A. Fink
Chairman & Chief Executive Officer
Guilford Transportation Industries, Inc.
Iron Horse Park
North Billerica, Massachusetts 01862-1690

Subject: *Offer to Purchase Connecticut River Line Interests*

Dear Mr. Fink:

As you know from our discussions since last spring, Amtrak desires to reinstitute Montrealer service upon completion of necessary upgrading on the Connecticut River Line. We have made no satisfactory progress towards reaching an agreement with Guilford concerning the terms for the prompt and economical rehabilitation of the line and restoration of operations over B&M property between Springfield and White River Junction. We have now reached agreements with the Central Vermont Railway that will permit restoration of service, but since the CV does not own or control operations over portions of the Connecticut River Line, we need to acquire certain interests in that line from B&M.

Amtrak hereby offers $1 million ($1,000,000.00) for purchase of the following property or contract interests from B&M or Guilford in the Connecticut River Line:

(1) all rights, titles and interests (with the exception of interests in existing fibre optics leases) in the

rail right of way and structures between a point where the CV owned trackage at the north end of the Connecticut River Bridge in Windsor, Vermont terminates (approximately B&M MP 108.3) and a point where CV owned trackage at Bridge Street in Brattleboro, Vermont (approximately B&M MP 60.1) commences;

(2) all rights, titles and interests in a spur track (known as the Brattleboro or West River Spur) and right of way extending from the CV right of way to a line ten feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV owned trackage;

(3) the right to dispatch operations over the trackage between White River Junction, Vermont and East Northfield, Massachusetts secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930 (1930 Agreement) and other informal operating arrangements between CV and B&M;

(4) rights under the 1930 Agreement to maintain and operate the segment of CV trackage between the point north of the Connecticut River Bridge where B&M owned trackage terminates (approximately B&M MP 108.3) and a point adjacent to the passenger depot at Windsor, Vermont (approximately B&M MP 108.9) where CV owned and maintained trackage commences; and

(5) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

Amtrak proposes to acquire the referenced property and contract interest by quit claim deed and related documents

at a closing to be scheduled as soon as possible. Concurrent with such conveyance, B&M will be granted trackage rights for continuing its present freight operations over the line, including the sole right to serve shippers' facilities existing on the Line as of the date the property rights are conveyed. The right to serve new facilities and shippers coming into existence after the date of conveyance shall be reserved for CV. B&M will also be granted the right, along with CV, to interchange at Bellows Falls, Vermont with the Green Mountain Railroad (or its assignees or successors) and at Claremont Junction, New Hampshire with the Claremont and Concord Railway (or its assignees or successors). B&M's operating rights shall be subject to equitable arrangements for sharing maintenance and operating costs over the entire line, and rentals owed the state of Vermont for use of its property at Bellows Falls. No additional interest or fixed rental charge will be assessed for these rights. At or shortly after the closing, Amtrak will convey its interests in the property to CV, subject to these trackage rights.

Our offer to pay you $1 million reflects the value of Amtrak obtaining control of and access to the line promptly so that upgrading can commence as soon as weather permits, without the expense and effort entailed in a condemnation proceeding. Therefore, we believe our offer exceeds the level of "just compensation" required under Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. § 562(d).

If you do not accept Amtrak's offer by executing a binding letter of intent by April 1, 1988, Amtrak will have to consider that it is unable to reach agreement with Guilford or B&M on the terms of the sale of property required for intercity rail passenger service. Pursuant to Section 402(d), Amtrak will then apply to the Interstate Commerce Commission for an order requiring conveyance of the property to Amtrak.

Your prompt attention to this offer would be appreciated.

Sincerely,

[Signature]
Dennis F. Sullivan
Vice President-Operations
and Maintenance

[Exhibit 2 to Larson Verified Statement]

Boston & Maine Corporation
Delaware & Hudson Railway Company
Maine Central Railroad Company

[Logo]

Iron Horse Park
No. Billerica, Mass. 01862

March 29, 1988

Dennis F. Sullivan, Vice President
—Operations and Maintenance
National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001

Re: Connecticut River Line

Dear Mr. Sullivan:

In response to your letter to me dated March 18, 1988, this will confirm that I welcome the return of the Montrealer provided that Amtrak agrees to pay its fair share of the additional costs resulting from Amtrak's requirement that B&M substantially rebuild the Connecticut River Line to meet the unique speed requirements of Amtrak.

As always, I am willing to enter into negotiations promptly regarding the terms of compensation to be paid by Amtrak to operate the Montrealer over the property of B&M. I will expect, however, that both parties will enter those negotiations in good faith and will fully address the issue of payment of the costs of the additional annual maintenance required to be performed solely for the benefit of Amtrak. Once such an agreement is reached, I expect that Amtrak could resume operation of the Montrealer within a reasonable time.

When I discussed this matter last week with Mr. Larson, Amtrak's Vice President, I also suggested to him that if

for any reason Amtrak and B&M are unable to agree upon the amounts or apportionment of the additional expenses resulting from Amtrak's operation on the line, I am willing to permit a third party, such as the Interstate Commerce Commission, to establish the proper level of compensation.

It is unfortunate that virtually no realistic negotiations or discussions have been engaged in by Amtrak since it unilaterally and abruptly decided to cease its operation of the Montrealer in April, 1987 and promptly thereafter commenced the litigation which is still pending before the National Arbitration Panel. I hope that approach by Amtrak is a thing of the past and that we can now commence good faith negotiations.

In light of the above, it appears clear that there is no need to pursue the very complex "offer to purchase" set forth in your letter, nor to comment in detail on the inapplicability of Section 562(d) to this situation. Generally, however, you should be aware that the terms set forth in your letter raise several troubling issues, including, without limitation, the gross insufficiency of compensation, lack of specificity, excessive breadth and unnecessarily severe anti-competitive impact of the seizure, as well as the failure of the unilateral "take it or leave it" offer to satisfy the requirement of realistic, good faith negotiations prior to seizing our private property for the benefit of our direct competitor.

Please contact me promptly so that arrangements can be made for negotiation. I would also appreciate receiving from you for my review prior to the negotiations all public information which is available regarding the terms of the proposed agreements with CV as referred to in your letter and the terms of payments set forth therein.

Sincerely,

[Signature]

David A. Fink
Chairman and
Chief Executive Officer

sm
Federal Express

[Exhibit 3 to Larson Verified Statement]

National Railroad Passenger Corporation, 400 North Capitol Street, N.W., Washington, D.C. 20001 Telephone (202) 383-3000

AMTRAK [Logo] **VIA DHL EXPRESS**

March 30, 1988

Mr. David A. Fink
Chairman & Chief Executive Officer
Guilford Transportation Industries, Inc.
Iron Horse Park
North Billerica, MA 01862-1690

Subject: *Offer to Purchase Connecticut River Line Interests*

Dear Mr. Fink:

We interpret your letter dated March 29, 1988, as rejecting our offer to purchase the Connecticut River Line. If this interpretation is not correct, please contact me immediately. As indicated in my letter of March 18, 1988, if we do not receive a binding letter of intent by April 1st, we will proceed with our application to the Interstate Commerce Commission to acquire the Line.

Sincerely,

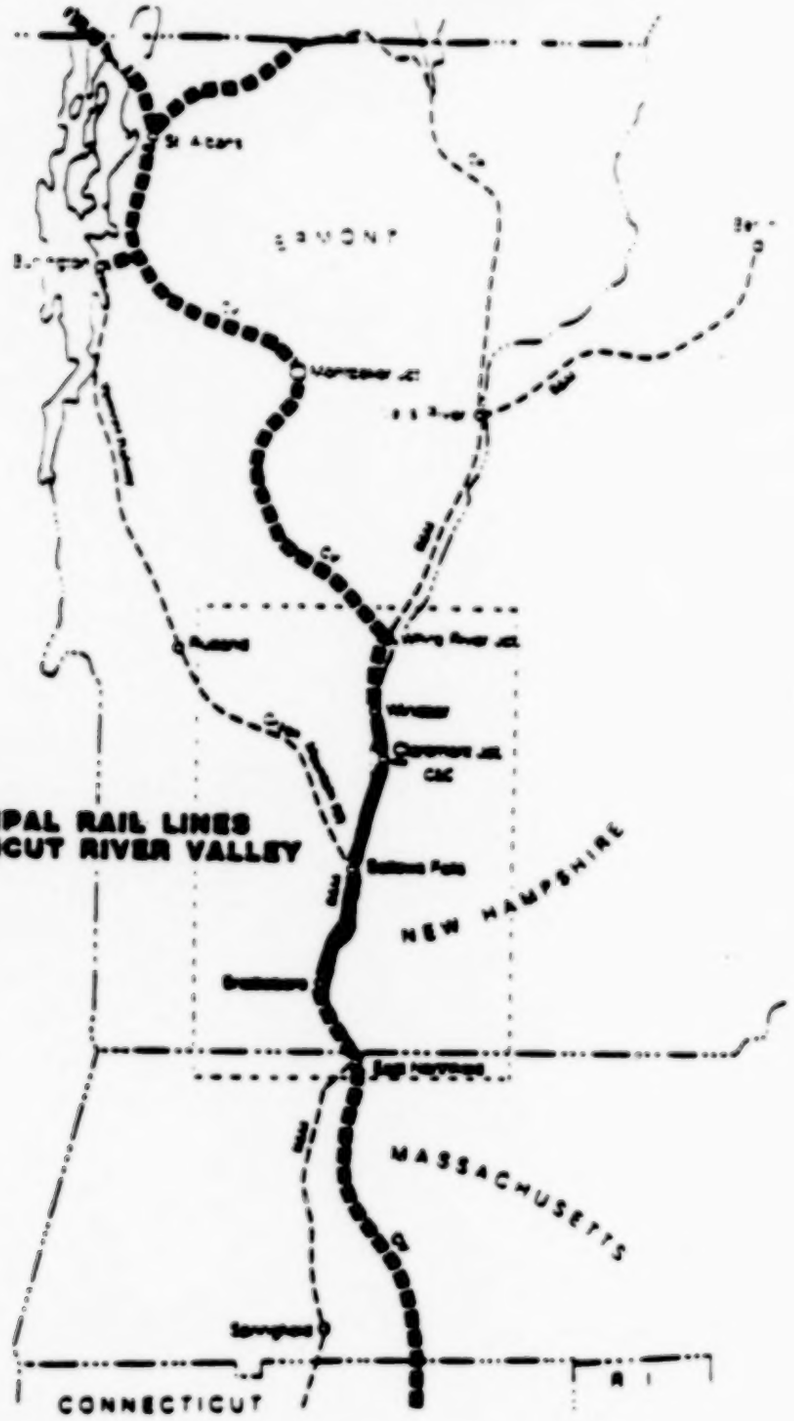
[Signature]

Dennis F. Sullivan
Vice President-Operations
and Maintenance

[Exhibit 4 to Larson Verified Statement]

BEST AVAILABLE COPY

[Exhibit 5 to Larson Verified Statement]



BEST AVAILABLE COPY

[Exhibit 18 to Larson Verified Statement]

Delaware & Hudson Railway Company
Maine Central Railroad Company

[Logo]

Iron Horse Park
No. Billerica, Mass. 01862

September 1, 1987

Mr. James L. Larson
Asst. Vice President
Contract Administration
Amtrak
400 North Capitol St., NW
Washington, DC 20001

Dear Mr. Larson:

In response to your letter of July 29, 1987, as I indicated to you during the telephone conversation referenced in your letter, the Boston and Maine sees no purpose in holding another meeting on the subject of the Montrealer for several reasons. Prominent amongst these was the fact that within hours of our last meeting on this subject, we received numerous telephone calls from media outlets in the Montrealer's service area asking very specific questions relative to issues that had been discussed at that meeting.

These inquiries indicated to us that Amtrak's assurances at that meeting that there would be no media involvement in these discussions had not been honored and that there was an attempt being made by Amtrak to bring public pressure to bear upon the B&M which would result in a settlement of these issues more favorable to Amtrak. B&M does not do business in this fashion nor do we negotiate our issues publicly in the media.

As has been stated on numerous occasions, we will be happy to meet with you to discuss the issue of the Mon-

trealer and would like to remind you that the Montrealer is not running at this time at Amtrak's express choice rather than due to any action on the part of the Boston and Maine Corporation. We do, however, insist that Amtrak observe the confidentiality of these negotiations and refrain from any attempt to bring outside media or political pressure upon the B&M in an attempt to obtain a settlement more favorable to Amtrak.

Sincerely,

[Signature]
J.R. Stoetzel
Vice President
Transportation

[RECEIVED]
[SEP 18, 1987]
J.L. LARSON]

cc: F. Colin Pease

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

Finance Docket No. 31250

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)—CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

VERIFIED STATEMENT OF HERBERT F. LONGHELT

I am Herbert F. Longhelt. I am employed as Deputy Chief Engineer of National Railroad Passenger Corporation (Amtrak) with my office at Corporate Headquarters, 400 North Capitol Street, N.W., Washington, D.C. 20001.

1. Background and Job Responsibilities

I received a degree in Civil Engineering from the University of Illinois in 1947. My railroad experience includes 24 years working in various engineering positions with the Illinois Central, the Rock Island Railroads and more than 16 years with Amtrak. When I began at Amtrak as Chief Civil Engineer in 1971, I was the first engineering employee of the Company. During the course of the last 16 years I have helped to obtain and organize engineering personnel to create an engineering organization that is respected throughout the railroad industry. My primary duties during that time have included coordinating engineering matters as they relate to our nationwide operations over various contract carrier railroads. Since 1976

this position has required close coordination with Mr. James Larson's contract administration responsibilities.

One of my areas of responsibility is directing the development and operation of systems to monitor the track geometry and ride quality of Amtrak's routes. Amtrak had no such capability in its formative years. However, we have been able to develop a track geometry measuring system which is one of the best in the industry. The Amtrak track geometry car, a state-of-the-art car introduced in August 1985 has tested over 80,000 miles of track using an optical laser gauge, capable of measuring track variances, including through switches and over-road crossings. A computer on board the car provides geometry data in real time, and a location detection system pinpoints the defects.

2. Connecticut River Line Maintenance Agreement

My work at Amtrak has required me to become and remain quite familiar with the condition of Connecticut River Line ("the Line"), including the segment which Amtrak is seeking to acquire in this proceeding. Prior to the startup of the Montrealer service, I personally participated in the original 1972 inspection of the Line. From this inspection, and subsequent negotiations, a plan evolved whereby B&M would increase track speeds following tie and surfacing work, which was to be paid for by Amtrak. Track speeds to be achieved were specified by mile post locations.

When the B&M Operating Agreement was renegotiated in 1977, I assisted Mr. J.L. Larson in related engineering matters. Track speeds by specific mile post locations were also included in this contract; the speeds and limits were generally the same as those in the earlier contract. The 1977 Agreement also provided for Amtrak to pay B&M for track maintenance associated with maintaining the higher speeds provided by the 1973 Agreement and for a track patrol gang.

My information and continuing observations indicate the B&M met their contract maintenance obligations in a relatively satisfactory manner through 1981. Thereafter, slow orders became an increasing problem until 1986 when they became extensive, with no significant effort by B&M to correct the conditions which caused the slow orders.

3. 1986 Inspection of the Line

Concerned over the serious deterioration of the B&M line, I arranged for a special train to operate the Amtrak track geometry car over the Line on July 9, 1986. The following Amtrak personnel participated in this inspection trip:

R.C. Vanderclute - AVP Transportation
C.P. Wahmann - General Manager Operations & Maintenance Planning
S.A. Bruno - District Superintendent
R.L. Swoope - Division Engineer
H.F. Longhelt - Deputy Chief Engineer

The B&M representatives on this inspection trip were:

S.F. Nevero - Chief Engineer
R. Rice - Track Supervisor
T.E. Walker - Track Supervisor

The purposes of this inspection were to determine by actual measurement under load the track conditions on this line, to evaluate the slow orders vis-a-vis these track conditions, and to determine from B&M's engineering officers their plans for correcting these conditions.

Mr. S.F. Nevero, B&M's Chief Engineer, told me at that time there were no firm plans for major improvements of track conditions. He told me that defects found by this survey would probably be protected by slow order to comply with FRA standards, or that minimum work would be performed to bring it into compliance with FRA

Class I.[1] This position was completely unsatisfactory to Amtrak as it ignored B&M's contractual responsibility to maintain the track to the appropriate agreed upon speed.

4. 1987 Inspection of the Line

B&M continued to disregard its contractual obligations regarding maintenance of the Line throughout 1986. As a result, I requested R.L. Swoope, Amtrak's Division Engineer, to make a riding inspection of this line on January 20 and 21, 1987. He also made an on-the-ground inspection January 29, February 10 and 11, 1987. I have attached a copy of his two reports dated February 13, 1987 as Exhibits 1 and 2. Virtually no slow orders had been removed since our inspection of the Line in July 1986. Furthermore, Mr. Swoope's on-the-ground inspections indicated that the slow orders were appropriate, due to the substantially deteriorated condition of the rail line. Once again, B&M gave no indication that it planned to correct those deficiencies in the foreseeable future.

5. Spring 1987 Slow Orders

B&M placed additional slow orders in late March due to high water threat and unusual amounts of rainfall. I arranged for Amtrak's Assistant Division Engineer, A.J. Cloutier, to make a riding inspection of the track on train number 60 on April 3, 1987 and to subsequently make an on-the-ground inspection along with Amtrak's R.L. Swoope. Their report of April 9 is attached as Exhibit 3. That report concluded that "the safe operation of trains over portions of . . . [the Line] is barely within FRA standards, and could slip out of these tolerances at any given time at any give location."

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[1] FRA Class I track is the poorest quality track permitted under the FRA Track Safety Standards. Passenger trains are only permitted to operate at a maximum speed of 15 MPH on Class I Track.

6. April 20, 1987 Track Inspection

On April 20, 1987 I made a hy-rail inspection trip of the trackage in question with the following people:

J.L. Larson	Amtrak AVP Contract Administration
A.J. Cloutier	Amtrak Division Engineer
S.F. Nevero	B&M Chief Engineer
J.R. Stoetzel	B&M V.P.O.
C. Behlke	B&M G. Mgr.

During this trip Mr. Nevero repeatedly pointed out defects which dictated the speed restrictions he had placed on the Line. I inquired why he had not allowed a differential speed for passenger trains as allowed by FRA standard. He said "They are running the max speed that they consider as safe speed at this point." He further stated that the deteriorated condition and the resulting gauge problems were the reasons for the restrictions and that the speed differential was not allowed because of fear that the engines would spread the rail. Further, Mr. Nevero said that B&M did not plan to implement any tie or rail replacement program.

7. Subsequent Inspections and Arrangements With The Central Vermont Railway, Inc.

In light of B&M's continuing failure to perform the maintenance necessary to support agreed upon speeds, and as a result of our April 20, 1987 inspections, it was decided that the line was not suitable for passenger operations. Since then, Amtrak has persisted in its attempts to secure B&M's cooperation in restoring the Line to a level of utility which would permit restoration of the northern leg of the Montrealer service. We were aided in those efforts by the Congressional appropriation of $5 million for use in construction, rehabilitation, renewal, replacement or other improvements Amtrak believes are necessary to restore passenger service between Springfield and Montreal

through Vermont. However, and even in view of that additional funding, our efforts with B&M have proven fruitless, and the Line continues to deteriorate.

As a result, Amtrak management began discussions with the Central Vermont Railway, Inc. ("CV"). Those discussions, as I understood them, were aimed at arranging for restoration of the Line to permit Amtrak to reinstitute the complete operation of the Montrealer. As part of our planning to determine the feasibility and cost of resuming operations, I took another inspection trip over the Line segment between Brattleboro and Windsor, Vt. with CV personnel on February 2, 1988.

The following CV personnel were present:

T.J. Faucett	Chief Engineer
K. Bagby	Engineer, Communications and Signals
J. Dulac	Engineer, Track and Structures

Our inspection showed that B&M had not improved the condition of the Line since my inspection in April 1987, and that the condition of the track had continued to deteriorate.

If Amtrak acquires the property, and if CV receives authority to acquire it from Amtrak, CV has agreed to perform the repair and rehabilitation work necessary to restore passenger speeds to at least 55 MPH on the Line between Palmer, Massachusetts and Windsor, Vermont, subject to speed restrictions required by the FRA due to track curvature and to 59 MPH on the segment of the Line between Windsor and White River Junction, subject to the same speed restrictions. In addition, CV has agreed to increase the zone speed on the segment between Brattleboro and Windsor to 59 MPH, subject to the same restrictions, after the installation of additional continuous welded rail on that portion of the Line in segments sufficient to warrant a speed increase.

EXHIBIT 1
1 of 2

NATIONAL RAILROAD PASSENGER CORPORATION
INTEROFFICE MEMO

Date: [January 27, 1987]

Attachment A

TO: FILE

FROM: R.L. SWOOPE

SUBJECT: TRACK INSPECTION B&M RAILROAD, SPRINGFIELD, MASS. TO WHITE RIVER JCT., VT.

A riding inspection was made between Springfield, Mass. and White River Jct., Vt. on January 20, 1987 northbound and January 21, 1987 southbound on Amtrak Trains #60 and #61. Speed restrictions on hand January 20, 1987, 1800 hours, information from temporary speed restrictions summary, Central Division, Guilford Transportation Industries Company, No. AD 511, effective 2100 hours, Monday, January 19, 1987.

The speed restrictions are listed in the following order: location, direction, speed, defect, date of slow order:

WA Interlocking to M.P. 2 - Southward - Psgr. 15 MPH - Frt. 10 MPH, account ties and surfacing condition, 8-86.

WA Interlocking to Holyoke northward, 10 MPH, rail and road crossing conditions, 11-86.

M.P. 7 to M.P. 8, southward 10 MPH, surface and curve conditions 11-86.

M.P. 8 to M.P. 18, southward single, 30 MPH, surface and curve conditions, 11-86.

M.P. 28 to M.P. 28.40, single, 25 MPH, surface and crossing conditions, 11-85.

Deerfield and Deerfield Jct. - single, 10 MPH, rail and surface conditions, 1-87.

M.P. 28.40 and Deerfield (M.P. 32.7), single, Psgr. 40 MPH - Frt. 30 MPH, surface conditions. 7-86

Silver Street and East Northfield, single, Psgr. 40 MPH - Frt. 30 MPH, rail conditions, 7-86. M.P. 61 to M.P. 67, single, 30 MPH, tie condition, 4-85.

M.P. 67 and M.P. 68, single, 10 MPH, curve conditions, 4-85.

M.P. 68 to M.P. 73, single, 30 MPH, tie condition, 5-86.

M.P. 73 to M.P. 82.5, single, 10 MPH, tie condition, 12-85.

M.P. 102.80 to M.P. 108.80, single, Psgr. 15, Frt. 10, rail and tie conditions, 5-85.

Further in-the-field inspections will follow.

RLS/mlr
cc: John Moreland
H.F. Longhelt

Amtrak [Logo]

EXHIBIT 2

NATIONAL RAILROAD PASSENGER CORPORATION
INTEROFFICE MEMO

Date: [February 13, 1987]

TO: FILE

FROM: R.L. SWOOPE

SUBJECT: TRACK INSPECTION B&M RAILROAD, SPRINGFIELD, MASS. TO WHITERIVER JCT., VT.

In reference to memo dated January 27, 1987 concerning further inspection of the B&M Railroad between Whiteriver Jct., Vt. and Springfield, Mass. An inspection by walking between the MP location referred to in memo dated January 27, 1987 was made on February 10, 1987 and February 11, 1987.

All of the locations the conditions were about the same, poor surface and alignment, low joints, loose joints, severely chipped joints, rail was worn, shelly corrigated [*sic*]. In one location M.P. 67 to M.P. 68 the wheels of cars were riding on the joint bars. The rail for the most part was 112 RE, 1943. Approx. 8 anchors per rail length.

The gage was closely checked at various points and found to be mostly 57" ±. The ties were covered with snow and conditions of crossties could not be verified, but from the indication of the track surface the ties could very well be in poor condition. I would like to suggest after the snow melts about May 1, 1987 an inspection of the ties be made.

In my opinion from my observations in the field and riding the head end of the train, and past experience with the B&M Railroad on derailments, deferred or very little maintenance that the slow order are [*sic*] justified.

RLS/mec
cc: John Moreland
H.F. Longhelt

[RECEIVED]
[FEB 18 1987]
[Deputy Chief Engineer]

PROFIT WITH SAFETY
Amtrak [Logo]

EXHIBIT 3
1 of 3

NATIONAL RAILROAD PASSENGER CORPORATION
INTEROFFICE MEMO

TO: Mr. H.F. Longhelt Date: [April 9, 1987]
[Received]
FROM: A.J. Cloutier/R.L. Swoope [APR 13 1987]
[Deputy Chief Engineer]
SUBJECT: TRACK INSPECTIONS

The following data was obtained from a train ride over the B&M and Central Vermont maintained railroads between Springfield, Ma. and White River Junction, Vt., on Train #60 April 3, 1987. Additionally, between the above-mentioned locations, an on-site inspection of all 10 mph speed restrictions was made subsequent to the train ride.

LOCATION (from Springfield, Ma)	TIME TABLE SPEED (12/25/83 G.O. C-201)	SPEED RESTRICTION (by Bulletin Order 4/3/87)
Dp. 2:37A (reverse out of station) 2:44AM (north of Spring Tower)		
Spring Tower-W.A. (MPO.38)	10 mph	---
W.A. - MP 2.0	Southbound track (251 Territory) against current of traffic 20 mph	15 mph
Hand thrown crossovers at Round Hill (MP 1.06) rough ride at 15 mph.		
MP 2.0 - MP 7.0	Southbound against current 30 mph	10 mph (track conditions)
MP 7.0 - MP 8.0	25 mph	10 mph (track conditions)
Dp. Northampton 4:07A, (52″ late)		
MP 8.0 - MP 18.0	30 mph	10 mph (high water)
Cross level should be better between MP 11.0 - MP 13.0 even at 10 mph.		
MP 18.0 - MP 23.5	55 mph	---
MP 23.5 - MP 28.0	40 mph	---
MP 28.0 - MP 28.4	40 mph	25 mph

JA-78

LOCATION (from Springfield, Ma)	TIME TABLE SPEED (12/25/83 G.O. C-201)	SPEED RESTRICTION (by Bulletin Order 4/3/87)
MP 28.4 - MP 32.7	40 mph	---
MP 32.7 - MP 34.6	30 mph	10 mph (track conditions)
MP 34.6 - MP 37.7	30 mph	---
MP 37.7 - MP 49.7	55 mph	40 mph
MP 49.7 - MP 60.32 (CV MP 110.6-120.70 maintained by CV)	49 mph	---** ** except at MP 114.2-116.0 30 mph
Dp. Barattleboro [sic] 5:26A (59″ late)		
MP 60.32 - MP 67.0	50 mph	30 mph
MP 67.0 - MP 68.0	50 mph	10 mph (track conditions)
MP 68.0 - MP 73.0	50 mph	30 mph
MP 73.0 - MP 82.5	50 mph	10 mph
Three inch profile sag between MP 81-82, ditching for water between MP 73-77.		
MP 82.5 - MP 83-4	50 mph	30 mph
MP 83.4 - MP 84.5	50 mph	10 mph*

*track conditions through tunnel and crossing south of Bellows Falls Station - very poor drainage.

JA-79

LOCATION (from Springfield, Ma)	TIME TABLE SPEED (12/25/83 G.O. C-201)	SPEED RESTRICTION (by Bulletin Order 4/3/87)
Dp. Bellows Falls 6:54A (1'59" late)		
MP 84.5 - MP 102.8	50 mph	30 mph
MP 102.8 - MP 108.0 Cross level rough at 15 mph, joints between rails.	40 mph	15 mph
MP 108. - MP 123.2 (CV MP 0.70 - MP 14.8 maintained by CV)	50 mph	———* *except at CVMP4.2-4.4: 30 mph MP9-11.0: 45 mph MP11-12.0: 40 mph MP12-14.4: 45 mph MP14.5-14.8: 10 mph

JA-80

Ar. White River Junction 8:19A (1'54" late)

WALKING INSPECTION

CURVE LOCATION	GAGE (INCHES)	REMARKS
MP 10.67	57 1/2 57 3/4 57 3/4	100 lb. N.H. (1928) Joint batter, one cracked angle bar achor [*sic*] pattern poor and ineffective.
MP 103.1	57 1/2 57 3/4 Profile sag: 3"	100 lb N.H. (1928), anchors ineffective, rail moving south 4 1/2"

LOCATION (from Springfield, Ma)	TIME TABLE SPEED (12/25/83 G.O. C-201)	SPEED RESTRICTION (by Bulletin Order 4/3/87)
MP 81.5	Profile sag: 3" (approx. 250 long with 2" cross level at some joints)	
MP 77.6	57 3/4	100 lb rail, joint batter
MP 76.5 MP 75.2 MP 74.8	57 1/2 57 1/2 Profile sag: 3"	MP 74 - MP 77: ditching by high rail gradeall to alleivate [*sic*] water problem on west side of Row. Note: 30" cross track corrigated [*sic*] pipe on site to be installed at this location.
MP 70.8	57 1/4 to 57 1/2	
MP 67.8	57 1/2	
MP 7.5	58+ (1/4" space between base of rail and shoulder of plate.)	

JA-81

The safe operation of trains over portions of the above-mentioned track is barely within FRA standards and could slip outside of these tolerances at any given time at any given location. During the up-coming production season, attention must be paid to these locations or it would be questionable to continue service past the Fall of 1987.

[Signature]
A.J. Cloutier
Assit Division Engineer

AJC/mg

cc: Mr. B.R. Pohlot
Mr. D.J. Beatty

VERIFICATION

City of Washington)
) ss:
District of Columbia)

Herbert F. Longhelt, being duly sworn, deposes and states that he has read the foregoing statement, knows the facts asserted therein, and that the same are true and correct to the best of his knowledge and belief.

Executed at Washington, D.C. this [4] day of [April], 1988.

[Signature]
Herbert F. Longhelt

Subscribed and sworn to before me
this [4th] day of [April], 1988.

[Signature]
Notary Public
My Commission Expires _____

BEFORE THE
INTERSTATE COMMERCE COMMISSION
Washington, D.C.

Finance Docket 31250

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)—CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket 31259

CENTRAL VERMONT RAILWAY, INC.—PETITION FOR EXEMPTION—ACQUISITION AND OPERATION OF CERTAIN INTERESTS IN RAIL LINE FROM THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

VERIFIED STATEMENT OF SUSAN C. CRAMPTON

My name is Susan C. Crampton. I am employed by the State of Vermont as Secretary of its Agency of Transportation ("VAOT"), 133 State Street, Montpelier, Vermont 05602. I am submitting this Verified Statement in support of (1) Amtrak's application for an order requiring conveyance by the Boston and Maine Corporation ("B&M") of certain interests in the Connecticut River Line ("the Line") and (2) the petition of Central Vermont Railway, Inc. ("CV") for an exemption from regulation with respect to CV's acquisition of those interests in the Line from Amtrak.

1. Background

I was appointed to my present position as Vermont's Secretary of Transportation by Governor Madeleine M. Kunin in early 1985. I am responsible for management of VAOT, including its highway, airport and railroad programs. I am also responsible for advising the Governor on transportation policy and budget issues and for testifying before committees of the State legislature on transportation issues. I have participated in several task force studies on transportation issues and have discussed transportation issues with numerous civic, industry and consumer groups, as well as private citizens. I have been active in the American Association of State Highway and Transportation Officials ("AASHTO"), the Transportation Research Board ("TRB"), the Transportation Advisory Committee of the New England Governor's Conference, Inc. and in maintaining informal contact on regional transportation issues with my colleagues in the neighboring states of New Hampshire, Massachusetts and New York.

From almost the very beginning of my term in office, I have been very concerned about the course of Guilford Transportation Industries, Inc.("GTI"), particularly the low level of track maintenance on its B&M subsidiary's Connecticut River Line, both as it has affected railroad operations and the safety of persons and property along the Line. On August 27, 1985, after a rash of derailments along the Line, I participated in a joint VAOT/B&M inspection of the Vermont portion of the Line. (GTI/B&M representatives included Chairman and Chief Executive Office David A. Fink and Chief Engineer S.F. Nevero.) Over the years, I have had several meetings with F. Colin Pease, GTI's Vice President for Government Affairs, the most recent of which was in Montpelier on November 10, 1987, several weeks after we received notice from GTI that it had amended its System Diagram Map to include the Line in Category One.

2. State Of Vermont's Commitment To Preservation And Improvement Of Railroad Service

The State of Vermont's modern involvement in the railroad industry goes back to the abandonment of the Rutland Railway in the early 1960's.[1] In what became a prototype for constructive governmental response to abandonment of low-density lines, the State of Vermont purchased viable segments of the Rutland and leased them to newly-organized short line railroads for continued operation.[2] The two resulting short lines—Vermont Railway, Inc. ("VTR") (Bennington to Burlington) and Green Mountain Railroad Corp. ("GMRC") (Bellows Falls to Rutland)—continue in operation today. In 1973, the State acquired the former St. Johnsbury & Lamoille County Railroad (Swanton to St. Johnsbury; presently leased to and operated by the Lamoille Valley Railroad Company). More recently, in 1980, the State acquired the former Montpelier & Barre Railroad Corp. (Montpelier Junction to Graniteville; presently leased to and operated by the Washington County Railroad Corporation). At present, the State owns about 300 of approximately 746 miles of railroad trackage remaining in Vermont.

Over the years, using available federal and state funds, VAOT has also participated in a number of railroad rehabilitation projects. In 1976-77, using funds available through the New England Regional Commission, the State assisted B&M's prior management in improvements along the Line, including enlargement of the Bellows Falls tunnel, track work, rehabilitation of bridge abutments and signal system improvements. For many years, the State's grade crossing improvement program has assigned special

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[1] *See Rutland Ry. Corp.—Abandonment of Entire Line*, 317 I.C.C. 393 (1962).

[2] *State of Vermont and Vermont Ry., Inc.—Acquisition and Operation in Vermont*, 320 I.C.C. 330 (1963), *modified* 320 I.C.C. 609 (1964).

priority to Amtrak routes, including B&M's Connecticut River Line.

The State of Vermont also has taken an active part in regulatory proceedings before this Commission. It was the only public entity to oppose GTI's acquisition of control over B&M.[3] The State also opposed GTI's acquisition of control over the Delaware & Hudson Railway Company ("D&H"), in large part because of concern that GTI's control of both B&M and D&H almost inevitably would lead to downgrading of B&M's Connecticut River Line.[4] In 1986, in large part because of deep concerns about the ability of GTI management to provide adequate service over an expanded system, the State lobbied its Congressional delegation in opposition to the federal government's proposed sale of Conrail to Norfolk Southern. (To mitigate the threat of monopoly resulting from its proposed acquisition of Conrail, Norfolk Southern had proposed to transfer certain tracks and operating rights to GTI.)

Sadly, time and events have confirmed the validity of the State's concerns about GTI. The adverse impact of GTI control on freight and passenger operations over the Line now is apparent. Amtrak's *Montrealer* made its last run on April 5, 1987. The use and enjoyment of trackage rights by CV has been compromised by the Line's physical deterioration. On September 2, 1987, B&M amended its System Diagram Map (49 C.F.R. §§ 1152.10-1152.11) to include the Connecticut River Line in Category One (an-

[3] *Guilford Transportation Industries, Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 292, 297 (1982), *aff'd in part and rev'd in part sub nom. Lamoille Valley R.R., Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983).

[4] *Guilford Transportation Industries, Inc.—Control—Delaware & Hudson Ry., Co.*, 366 I.C.C. 396, 408 (1982), *aff'd in part and rev'd in part sub nom. Central Vermont Ry., Inc. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

ticipated to be the subject of an abandonment or discontinuance petition within the next three years).[5]

3. Amtrak's Resort To Use Of Its Authority Under Section 402(d) Of The Rail Passenger Service Act Was Reasonable

Based on my own observations of GTI's corporate behavior over the past several years, I believe that Amtrak's decision to resort to use of its authority under Section 402(d) of the Rail Passenger Service Act was reasonable.

Within the overall GTI system, the Connecticut River Line has been treated as a secondary route. Routine maintenance has been deferred and there is no evidence that GTI management has any remedial plan. Mr. Pease told me at our November 10, 1987 meeting that if and when improving revenues permit reinstitution of regular maintenance, the needs of GTI's own traffic on the Line would be adequately served by track supporting 25 m.p.h. freight train operation. Should other users of the Line—Amtrak and CV—desire track capable of supporting higher speeds, GTI's position is that the other users should pay fully for the additional rehabilitation and ongoing maintenance.

The Connecticut River Line also has suffered from various crises that have overtaken GTI during the past two years. During the most stressful periods resulting from GTI's labor and equipment safety problems, GTI management always has attached priority to maintaining the flow of east-west traffic between the Conrail connection near Albany, New York and points in southern Maine and in and about Boston. The likelihood of GTI's cooperating to rehabilitate the Line is further diminished by the fact that, in relative terms, the Line's present deterioration has had

[5] On March 24, 1988, two days *after* Amtrak filed its Notice of Intention to File Section 402(d) Application, B&M filed an amendment to its System Diagram Map. The Connecticut River Line now is conspicuously absent from Category One.

more of an adverse impact on CV, which is a competitor with GTI on some routes.

In view of GTI's history of neglect of the Line, and its lack of incentive to rehabilitate the Line to standards required for viable passenger service, I wholeheartedly agree with this Commission's finding that there is no basis upon which to conclude that Amtrak would *ever* be able to reach agreement with GTI on the terms of a sale of the Line. (April 29, 1988 Decision at p. 7.) Only prompt Commission approval of Amtrak's application and CV's exemption petition offers any realistic prospect of rehabilitation of the Line and restoration of the *Montrealer's* service.

4. CV's Acquisition Of Certain Interests In The Connecticut River Line Is Consistent With The National Transportation Policy, Is Limited In Scope And Should Not Result In Any Abuse Of Market Power

As I understand it, the Commission must exempt CV's acquisition of certain interests in the Connecticut River Line from application of the so-called control provisions of the Interstate Commerce Act, if it finds that: (1) such regulation is not necessary to carry out national transportation policy (as set forth at 49 U.S.C. § 10101a), and (2) either (A) the transaction is of limited scope *or* (B) the application of such provisions is not needed to protect shippers from the abuse of market power. In my view, each of these three tests is met in this case.

First, I believe that the exemption sought by CV for its acquisition of the interests in the Connecticut River Line is fully consistent with the national transportation policy. In particular, it is consistent with the policy "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. § 10101a(2). As I noted above, the Connecticut River Line has steadily deteriorated over the past two

years and a prompt resolution of CV's exemption petition—as opposed to prolonged application of the Commission's control provisions—is critical to getting the Line rehabilitated before the end of the year and expeditiously restoring reliable passenger and freight service.

Similarly, the exemption sought by CV is consistent with the national policies "to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public" (49 U.S.C. § 10101a[4]) and "to operate transportation facilities and equipment without detriment to the public health and safety" (49 U.S.C. § 10101a[8]). I believe that the deterioration of the Connecticut River Line at this moment threatens the "continuation of a sound transportation system" and is potentially detrimental to the "public health and safety." The proposed exemption is a significant step in halting this process of deterioration and restoring the Line to a healthy status.

The exemption sought by CV is also consistent with the national policy "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers." 49 U.S.C. § 10101a(5). B&M's failure to maintain a vital segment of the Connecticut River Line has important implications for the well-being of the other railroads operating in Vermont. Those railroads depend directly on connections with the Line for access to shippers and receivers both inside and outside of Vermont. The physical upgrading of the Line will enhance coordination among these railroads and generally enhance the competitiveness of railroads in Vermont. Moreover, the provision of the proposed CV/B&M agreement permitting, for the first time, *both* CV and B&M to interchange traffic with the GMRC at Bellows Falls will plainly increase competition.

Finally, CV's exemption petition is consistent with the national policy "to encourage and promote energy conser-

vation." 49 U.S.C. § 10101a(15). The deterioration of the Connecticut River Line has led to an exodus of shippers from railroads to motor carriers—a trend clearly inconsistent with energy conservation.

Second, the transactions which are the subject of CV's proposed exemption are also limited in scope. The transactions at issue apply to only about 48 miles of track. Today, both B&M and CV operate over that track (at least to the extent track conditions permit). As a result of the proposed transactions, this situation would remain unchanged: B&M and CV would continue to operate over the track.

Third, regulation in this instance is not required to protect shippers from abuse of market power. Indeed, the proposed transactions will benefit competition and shippers. Both B&M and CV will continue to operate over the Line, but the Line in the future should be able to sustain faster and improved service. Shippers on the GMRC will enjoy additional routing options over the CV. The State of Vermont and CV have entered into a Memorandum of Understanding in which CV has committed itself to public interest covenants on these points. (A copy of this memorandum is attached as Exhibit 1.) Thus, the proposed transactions, to the extent they have any competitive effect, should aid, not harm, competition.

In sum, I believe that CV's petition for exemption will enhance the national transportation policy. I urge the Commission to approve that petition promptly.

VERIFICATION

State of Vermont)
) ss:
County of Washington)

Susan C. Crampton, being duly sworn, deposes and states that she has read the foregoing statement, knows the facts asserted therein, and that the same are true and correct to the best of her knowledge and belief.

Executed in the City of Montpelier, County of Washington and State of Vermont, this [11th] day of May, 1988.

[Signature]

Subscribed and sworn to before me
this [11th] day of May, 1988.

[Signature]
Notary Public
My Commission Expires
February 10, 1991

[BOSTON & MAINE CORP.'S ARGUMENT AND EVIDENCE IN OPPOSITION TO NATIONAL RAILROAD PASSENGER CORP.'S SECTION 402(d) APPLICATION AND CENTRAL VERMONT RAILWAY, INC.'S PETITION FOR EXEMPTION, TAB 5, DOCUMENT 2, FILED IN THE ICC ON MAY 31, 1988]

January 6, 1988

To: Ronald E. Lawless
From: Gerald L. Maas
Subject: Authority Needed To Pursue Acquisition Of B&M Segment Of Connecticut River Line

At last October's CV Board meeting, we discussed the operating difficulties experienced by CV in connection with the 49 mile segment of the Connecticut River Line between Windsor and Brattleboro, Vermont owned and dispatched by the Boston and Maine Corporation. I subsequently supplied you with correspondence which we sent to David Fink of Guilford Transportation Industries, Inc., and to Dennis Sullivan of Amtrak for purposes of exploring solutions to these problems.

Service over and the physical condition of the B&M segment of the Connecticut River Line continues to deteriorate, and Guilford cannot be persuaded to voluntarily improve the situation. After exploring a wide range of proposals with Amtrak and the State of Vermont we have decided on a plan to initiate a proceeding in which Amtrak will condemn certain Guilford interests in the line and subsequently assign those interests to CV for purposes of upgrading and operating the line. CV and GTC Board approvals will be required.

Amtrak Conditions for Commencement of Condemnation

Amtrak has the authority under the Rail Passenger Service Act to seek an order from the Interstate Commerce Commission to condemn interests in rail property necessary to permit intercity rail passenger service, and would

like to use that authority to reestablish the Montrealer. But Amtrak does not want to own or operate the Line, and has no funds to acquire it. Therefore, Amtrak will proceed with condemnation only if it is fully indemnified for the amount finally determined to constitute "just compensation" and any other damages Guilford might be awarded.

This creates a problem in that it is impossible to know with certainty prior to a final award what level of compensation will be established. Since CV is not prepared to provide Amtrak with an open-ended guarantee, we have proposed to indemnify it up to the amount of $1.5 million.

In the event the award exceeds that amount and no alternative sources for funding the purchase (such as Congress or the State of Vermont) has been found, CV will direct Amtrak to withdraw the petition without taking title or possession of the property.

If the petition is withdrawn, Guilford might be entitled to recover its legal and consulting fees and other uncompensated damages so Amtrak is also insisting on being indemnified against such liability. While difficult to quantify, CV's exposure here is not great and the amounts involved relatively small.

We have been successful in obtaining legislation enacted by Congress which appropriates $5 million to reinstitute the Amtrak Montrealer service. A portion of this appropriation has been earmarked for upgrading the segment of the Connecticut River Line CV will acquire from Amtrak. CV is negotiating an agreement with Amtrak which will provide for this upgrading work. A second agreement will govern the reinstitution of the Montrealer service over the CV lines between Palmer, Massachusetts and East Alburgh, Vermont upon completion of the upgrading work.

Procedures for acquiring the Line

The first stage in the condemnation process is for Amtrak to submit a formal offer to purchase Guilford's interests in the Line. The amount offered will be $1.0 million which CV has agreed to make available to Amtrak for the purchase, which reflects the value to CV of acquiring the Line by March 1, 1988 so that upgrading can begin as soon as weather permits without the effort, expense and delay of a condemnation proceeding. If the offer is not accepted within a specific period (and we have reason to believe Guilford will not accept it), it will be withdrawn.

The next step is to file a petition for condemnation at the ICC together with evidence of valuation experts, land appraisals and legal briefs. We will probably contend that "just compensation" is something less than the amount we originally offered. Given the divergence of views concerning the value of the property and Guilford's proclivity for controversy, a hard-fought proceeding can be expected. The statute contemplates expeditious handling by the ICC, but the law in this area is not settled and any order will be subject to appeal. Possession of the property can be taken upon issuance of the initial order, but only at the risk of a judicial determination that the compensation set is inadequate and might ultimately be established at a level which exceeds the value to CV.

We believe that by the time of the Commission's initial decision we should be able to evaluate the substance of Guilford's evidence on value and better assess our risk of a high valuation of the property. The Vermont Agency of Transportation strongly supports our efforts to acquire the Line, and has indicated a willingness to propose state legislation which could make funds available in the event the finding on just compensation exceeds what CV is prepared to pay. Provided such assistance can be obtained without unreasonable conditions upon CV operation of the Line, it

could virtually eliminate the risks of taking the property prior to a finding on just compensation.

To proceed with this plan, CV management requests the following authorizations:

(1) to acquire from Amtrak or Guilford title to the 48.8 mile segment of the Connecticut River Line between Windsor and Brattleboro, Vermont (including trackage in New Hampshire between Windsor and Bellows Falls, Vermont and the right to dispatch trains between White River Junction, Vermont and East Northfield, Massachusetts) subject to terms and conditions deemed by management to be necessary to assist Amtrak's acquisition of such interests through a voluntary purchase agreement with Guilford or through the condemnation process;

(2) to make arrangements for the payment up to $1.5 million for acquisition of the interests described above, including the creation of an escrow fund and/or the issuance of a Grand Trunk Corporation guaranty in that amount; and

(3) to agree on behalf of CV and GTC to indemnify Amtrak for any damages awarded Guilford as a consequence of withdrawing the condemnation petition should the finding of just compensation exceed an amount CV is willing to pay for the rights to be acquired.

This information is provided as background for discussions scheduled for January 11 in your office.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 31250

National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interest in Connecticut River Line In Vermont and New Hampshire

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Finance Docket No. 31259

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation

VERIFIED STATEMENT OF DAVID A. FINK

My name is David A. Fink, and I am President and Chief Executive Officer of Boston and Maine Corporation ("B&M"). I am familiar with the Connecticut River Line, operations on that Line and the Montrealer passenger service which B&M operated for the National Railroad Passenger Corporation ("Amtrak"). I am also familiar with the application filed recently by Amtrak under Section 402(d) of the Rail Passenger Service Act in which Amtrak is seeking to acquire ownership of the Connecticut River Line between Brattleboro, Vermont and Windsor, Vermont and with the petition of Central Vermont Railway, Inc. ("CV") for exemption of the proposed sale of the Connecticut River Line by Amtrak to CV.

Discussions between B&M and Amtrak concerning the condition of the Connecticut River Line have been ongoing for several years. B&M has always advised Amtrak that

B&M requires speeds of not more than 25 miles per hour for its freight operations on the Connecticut River Line. Amtrak, on the other hand, has continued to insist that the Line be upgraded in order to permit passenger trains to operate at speeds up to 60 miles per hour. Amtrak has always been unwilling, however, to pay for the cost to maintain the Line at such speeds. The cost to maintain the Line at the condition which Amtrak desires would be approximately $8,000 per mile per year more than it would cost to maintain the Line for freight operations only.

In 1987, Amtrak initiated arbitration proceedings under the 1977 Agreement between B&M and Amtrak. Amtrak has taken the position in the arbitration that B&M has not maintained the Connecticut River Line as required under the 1977 Agreement. B&M believes that it has complied with the maintenance requirements under the Agreement. In addition, B&M has taken the position that the 1977 Agreement has terminated. No decision has been rendered on these issues, and arguments are scheduled to be heard by the arbitrators in July, 1988.

After Amtrak discontinued operations of the Montrealer in April, 1987, B&M has consistently advised Amtrak that B&M is willing to have operations of the Montrealer resumed if Amtrak would agree to pay for the incremental cost of maintaining the Connecticut River Line to accommodate the unique requirements and high speeds desired by Amtrak. B&M is still willing to enter into a new agreement with Amtrak on such terms. In addition, if Amtrak would agree to such reasonable terms and conditions, B&M is ready, willing and able to use the $5 million appropriated by Congress in 1987 to upgrade the Connecticut River Line.

Amtrak has always refused to acknowledge any obligation to pay for the additional maintenance of the Connecticut River Line which would be required in order to maintain it at speeds of up to 60 miles per hour. In ad-

dition. Amtrak has refused B&M's past invitation to purchase the Connecticut River Line and to grant B&M a permanent freight easement in that event. Until March 18, 1988, Amtrak had always taken the position that it had no interest in purchasing the Connecticut River Line.

In a letter dated March 18, 1988, Amtrak first offered to buy the Connecticut River Line. I never received any calls or any other inquiry from Amtrak after it sent the letter dated March 18. I called Jim Larson of Amtrak on March 25, 1988, and advised him that B&M had no problem with the concept of selling the Connecticut River Line to Amtrak but that Amtrak's plan to turn the Line over to CV, a direct competitor of B&M, caused B&M grave concern. In that conversation, I also indicated to Mr. Larson that B&M would have no such problem in considering a sale of the portion of the Connecticut River Line located in Massachusetts to the Commonwealth of Massachusetts, since such a transaction would not result in the Line being turned over to a competitor of B&M.

Amtrak never responded to this conversation with Mr. Larson. There were never any discussion or negotiations between B&M and Amtrak concerning the March 18 offer to purchase the Connecticut River Line. B&M was and continues to be willing to talk with Amtrak concerning a sale. In any such discussions, B&M would ask to receive a fair price in payment for the Line, but we have not yet completed an appraisal and have, therefore, no definitive idea at this time of the true value of the Line. If B&M were to sell the Connecticut River Line to Amtrak, we would insist upon a freight easement or some similar arrangement to ensure B&M's ability to continue to serve customers on and to operate over the Connecticut River Line. We would also want to retain the right to develop the Line for fiber optic purposes or for other subsurface projects which would not interfere with rail operations. B&M would continue to object to a sale of the Line to CV, as proposed by Amtrak.

I responded to the Amtrak letter dated March 18, 1988, in a letter to Amtrak dated March 29, 1988. My letter was not a rejection of Amtrak's offer to purchase. Rather, the letter reflected Amtrak's lack of interest in retaining ownership of the Line and suggested an alternative consistent with B&M's prior offers and continuing position that the Montrealer could be resumed over a B&M-owned Connecticut River Line if Amtrak would agree to reasonable terms and conditions. B&M has gone one step further to suggest to Amtrak that the Commission or some other neutral party could decide reasonable terms and conditions, including how much Amtrak should pay for maintenance, if the parties were unable to agree. Amtrak never made any attempt to discuss this offer.

I am also President and Chief Executive Offer of Delaware and Hudson Railway Company ("D&H"). D&H has a line between Albany, New York and the U.S.-Canadian border at Rouses Point, New York. This D&H line is currently used by Amtrak for a train which operates between New York City and Montreal. The D&H line is in excellent condition, and passenger trains can operate at speeds up to 70 miles per hour over certain portions of the line. The D&H line connects at Schenectady with the Empire Corridor line, which has been upgraded to accomodate [*sic*] passenger trains at 100 miles per hour over much of its length.

D&H is willing to enter into an agreement with Amtrak permitting the Montrealer to operate over the D&H line as an alternative to the Connecticut River Line. Such an agreement could be reached either pursuant to Section 402(a) of the Rail Passenger Service Act or through negotiation.

B&M views the Connecticut River Line as extending from East Deerfield at the southern end and to Berlin and Groveton, New Hampshire at the northern end. The Connecticut River Line is a relatively light density, mar-

ginal operation, but it is important to B&M. There is still a substantial amount of traffic to and from Berlin and Groveton, and B&M and Canadian Pacific have a significant amount of traffic which moves over this Line. Even though the Line was temporarily listed in category 1 in our system diagram map, B&M wants to continue to operate on the Connecticut River Line.

If CV is permitted to acquire ownership of the Connecticut River Line between Brattleboro and Windsor and to have access to customers, as proposed by CV, it will be increasingly difficult for B&M to continue to operate over the Connecticut River Line. Under the CV proposal, B&M will gradually lose much of its local traffic. If that occurs, operations on the Line as a whole will become even less viable. In those circumstances, B&M will have to consider a down grading of the Line or cutting back on service or even abandonment.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS :
: ss:
COUNTY OF MIDDLESEX :

David A. Fink, being duly sworn according to law, deposes and says that he has read the foregoing Verified Statement, that he is familiar with the contents thereof and that the statements therein are true and correct to the best of his knowledge, information and belief.

[Signature]
David A. Fink

Sworn to and subscribed
before me this [27] day
of May, 1988

[Signature]
Notary Public

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 31250

National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interest in Connecticut River Line in Vermont and New Hampshire

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Finance Docket No. 31259

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation

VERIFIED STATEMENT OF F. COLIN PEASE

My name is F. Colin Pease, and I am employed by Boston and Maine Corporation ("B&M") as Vice President—Governmental Affairs. I have held this position since June 30, 1983. Part of my duties and responsibilities includes the relationship between B&M and the National Railroad Passenger Corporation ("Amtrak").

I am familiar with the arrangements pursuant to which Amtrak formerly operated its train called the "Montrealer" between Washington and Montreal. A portion of the Montrealer's route involved the line between Springfield, Massachusetts and White River Junction, Vermont. This line, known as the Connecticut River Line, is owned primarily by B&M, but two segments of the line are owned by Central Vermont Railway, Inc. ("CV").

I am familiar with the application filed by Amtrak with the Commission seeking to acquire ownership of B&M's

interests in the Connecticut River Line and with the petition for exemption filed by CV, the primary competitor of B&M in this area, in which CV seeks authority for an immediate transfer of the Line from Amtrak to CV.

I have been personally involved in discussions with Amtrak, CV, the State of Vermont and others concerning the Montrealer and the condition of the Connecticut River Line. Discussions concerning the maintenance on the Connecticut River Line go back at least two years. In these discussions, Amtrak noted that the track condition was not ideal for meeting the unique requirements of Amtrak and operating passenger trains at speeds which Amtrak would have preferred. On the other hand, Amtrak recognized that the track condition was perfectly adequate for B&M's freight service. More importantly, Amtrak always acknowledged that B&M lacked the funds to bring the line up to the speeds desired by Amtrak. In the course of these discussions, which were generally amicable, we attempted to find a method by which Amtrak's desire to operate at faster speeds could be accommodated.

From the fall of 1986 through the spring of 1987, I was involved in on-going discussions with Amtrak and with Massachusetts Congressman Silvio Conte and his staff and with the staff of Senator Leahy of Vermont. The discussions focused upon Amtrak's desire to upgrade the Connecticut River Line and the desirability of the appropriation of federal funds to permit that to occur. At all times during this period, Amtrak and B&M worked jointly and cooperatively towards this goal. In addition, the State of Vermont was informed of these discussions.

During these discussions, Amtrak continued to express its desire to increase the speeds on the Connecticut River Line, but it never threatened to stop running the Montrealer. In fact, on February 24, 1987, I met with Tom Gillespie of Amtrak to discuss the need to work jointly to seek ways to fund a rehabilitation project on the Con-

necticut River Line. Mr. Gillespie never suggested that Amtrak would be taking a precipitous action and agreed to work jointly to seek funding and to work together on other areas of mutual interest. Due to B&M's lack of sufficient funds, both parties believed that a federal appropriation in the amount of approximately $5 million would be the only solution.

In April, 1987, flooding of the Connecticut River caused B&M to suspend all service on the Connecticut River Line for several days. When the flood waters subsided, B&M resumed its freight operations over the Connecticut River Line and authorized the resumption of passenger service. Amtrak, however, abruptly decided that it would not operate the Montrealer. This decision was a complete surprise to B&M and has never been adequately explained by Amtrak.

Amtrak has contended that it stopped running the Montrealer due to the allegedly poor condition of the Connecticut River Line. The condition of the Connecticut River Line was, however, the same after the flooding in April, 1987, as it was before the flooding. Consequently, there was no reason why Amtrak could not have resumed the Montrealer's operations after the flood or at the present time and continued to work cooperatively on a long term solution to the service.

Beginning as early as May, 1987, I participated in numerous meetings and discussions with various state, federal and Amtrak officials in an attempt to resolve issues relating to Amtrak's decision to discontinue operations of the Montrealer over the Connecticut River Line. Those discussions addressed the prospect of having some public entity acquire all or a portion of the Line in order to facilitate the investment of public funds into the track and facilities for the purpose of operating high speed rail passenger service. Specific discussions were held with Amtrak, the Secretary of Transportation for the State of

Vermont and the counsel to the Secretary, various officials from the Commonwealth of Massachusetts, staff of Congressman Conte and Senator Leahy and attorneys representing the CV. Prior to May, 1987, I also met with Phil Larson, General Manager of CV, to discuss his interests in the portion of the Connecticut River Line between Windsor, Vermont and Brattleboro, Vermont.

In July, 1987, Congress appropriated $5 million which could be used for upgrading the Connecticut River Line. The statute contemplated that the funds would be used in accordance with an agreement between the parties. I had several meetings with Jim Larson of Amtrak to discuss an agreement for the use of those funds.

While numerous conversations took place by telephone, I did participate in a meeting with officials from Amtrak, including Jim Larson, on or about July 20, 1987, at our offices in North Billerica, Massachusetts. At that meeting, in which several key officials from the GTI rail system were present, we discussed a number of options which would result in the reactivation of Montrealer service. Included in those discussions were proposals by Amtrak that the train be rerouted via Springfield, Massachusetts over Conrail to a point in Palmer, Massachusetts where Conrail connected with CV and then north via CV to East Northfield, where CV's line joins the Connecticut River Line, and then to White River Junction over the Connecticut River Line. Amtrak also indicated that it was considering another option of operating via the Connecticut River Line to the B&M main line in East Deerfield, where it would operate east to a point where B&M intersects CV and then north via CV to East Northfield and over the Connecticut River Line to White River Junction. In both cases, Amtrak acknowledged that in order to perform these alternate moves efficiently certain capital investments, utilizing non-Amtrak funds, would have to be made to construct efficient connections.

As part of these discussions, the parties considered the feasibility of selling all or portions of the Connecticut River Line to Amtrak or another public body in order to permit the investment of public funds into the tracks and facilities for upgrading and maintenance of the line to a speed of 55 miles per hour—a speed considerably in excess of the speeds necessary for an efficient rail freight operation. One option which was explored was the possible acquisition by Amtrak of the Line between Springfield and Windsor in order to assure the availability of the Line for future passenger service. During that meeting and at future meetings and discussions, Amtrak indicated that it could not justify such an investment for an operation which would not exceed one passenger train per day in each direction. Throughout these discussions, it was at all times made clear by Amtrak that it had absolutely no interest in acquiring the property.

Subsequent to the meeting in North Billerica, I discussed the situation with staff from Congressman Conte's office and from Senator Leahy's office, both by telephone and in several meetings in Washington. During those discussions, I indicated that one option available to them was to encourage Amtrak to acquire the Connecticut River Line for the purpose of preserving the Montrealer service. The result of all these discussions was that Amtrak either had no interest in acquiring the Line or could not justify the acquisition of a lightly used line for the purpose of operating only one passenger train per day in each direction. All of the Government officials favored some method of preserving the Line in a manner which would assure that Amtrak had a continuing interest in operating the Montrealer but recognized that it would not be possible to force Amtrak to acquire the Line.

Officials of Amtrak and I had at least one additional meeting held in the office of Senator Leahy. At that time, we discussed a number of options which, if implemented, would have resulted in the resumption of Montrealer ser-

vice. I suggested to Amtrak that there was a certain maintenance cost associated with operating a light density freight operation efficiently at or below 25 miles per hour and a significantly higher cost to maintain the Connecticut River Line for safe operation of passenger trains at 55 miles per hour. Amtrak continued to insist that B&M maintain the track for operation at the 55 miles per hour desired by Amtrak. I indicated that B&M was prepared to enter into an agreement which would provide for B&M to pay the costs associated with the operation of the freight service and for some other entity, such as Amtrak or a public agency, paying the additional cost associated with the operation of a 55 miles per hour passenger service.

Amtrak refused and indicated that it would be willing to pay an amount which approximated $1.65 to $1.75 per train mile. Through Congressional staff people, Amtrak later indicted [*sic*] that it might be willing to consider a payment of $2.00 per train mile, a figure which B&M believed to be totally inadequate. The offers appeared to be arbitrary, because Amtrak indicated no willingness to make a legitimate effort to determine the actual costs associated with each type of maintenance. Informally, Amtrak officials did concede that after an expenditure of approximately $5 million to rehabilitate the Connecticut River Line between Springfield and Windsor the maintenance costs associated with operation of the freight service would approximate $8,000 to $9,000 per mile per year and the costs to maintain the line for 55 miles per hour passenger service would be approximately $15,000 to $18,000 per mile per year. They indicated that such an expenditure could not be justified for the two passenger trains per day. Amtrak stated that it understood the concept being advanced by B&M but that agreeing to pay the incremental costs would be a "bad precedent." They also recognized that the $5 million which had been appropriated was not sufficient to attain the desired speeds or to fund essential rail replacement work. It was apparent, at least

through September, 1987, that Amtrak had no interest in negotiating an agreement based on a fair allocation of costs and that it had no interest in seeking a procedure, were the parties unable to agree, which would result in a fair allocation of costs.

B&M has always stated that the Montrealer can operate if Amtrak will simply pay the way. It could resume Montrealer service today, but Amtrak refuses. Under these conditions, B&M has been able to agree with Amtrak to use the $5 million to upgrade the Connecticut River Line. B&M simply could not agree to commit the enormous continuing maintenance expenditures which Amtrak insisted upon as a price for the initial upgrading of the Line.

B&M has been and continues to be willing to resume the operation of the Montrealer and to use the $5 million provided that Amtrak compensates B&M for the increased maintenance costs. B&M has suggested, both in the letter of March 29, 1988, from David A. Fink of B&M to Amtrak and in the "Verified Petition of Boston and Maine Corporation to Convert Application Under Section 402(d) of Rail Passenger Service Act to Application Under Section 402(a)," dated April 22, 1988, that it is willing to have the Commission determine reasonable terms and conditions, including the amount which Amtrak should pay for maintenance. Amtrak has refused to participate in any such discussions or to permit the Commission or some other neutral party to decide these issues.

The Connecticut River Line is an important part of the GTI system, which is comprised of the lines of B&M, Maine Central Rail Company ("MEC") and Delaware and Hudson Railway Company ("D&H"). B&M has no desire to abandon the Connecticut River Line. On the contrary, service on the Connecticut River Line has recently been increased to five days a week.

B&M has important customers at Berlin and Groveton, New Hampshire, the northern terminus of the Connecticut

River Line, which can be served only by means that [*sic*] Line. In addition, interchange traffic with CV and with Canadian Pacific ("CP") moves over the Connecticut River Line. After an experiment in handling CP traffic over an alternate route of D&H, CP is again interchanging traffic with B&M at Wells River, Vermont.

The Connecticut River Line has the prospect of increased viability and profitability for B&M as a result of the Springfield Terminal Railway Company ("ST"). ST is a wholly-owned subsidiary of GTI and is the lessee and operator of most of the lines of B&M. ST has more flexible work rules and the capability of providing more efficient service than B&M. ST is presently serving the B&M customers at Groveton and Berlin, and ST operates the Connecticut River Line between Springfield and East Deerfield, Massachusetts. It is anticipated that ST will take over operations and maintenance of the balance of the Connecticut River Line as soon as arbitrators decide upon the appropriate labor protective conditions and certain legal proceedings and arbitration instituted by CV are resolved.

The State of Vermont has expressed its interest in purchasing the Connecticut River Line. B&M indicated its willingness to consider a sale of the Line at its fair market value so long as B&M could retain a comprehensive freight easement and the rights for fiber optic and other uses which do not interfere with rail operations.

During the discussions with Amtrak and other public officials regarding the Montrealer in August, 1987, I received a telephone inquiry from Robert vom Eigen, who represented himself to be an attorney for CV. Mr. vom Eigen indicated that CV had an interest in acquiring the Connecticut River Line between Brattleboro and Windsor, Vermont. I replied that within the past year I had dinner with Phillip Larson of CV to discuss the same issue and that it was very apparent from our prior discussions that CV did not have sufficient funds to pay for the Line if

an agreement were reached. I further indicated that, if a decision were to be made to sell the Line to CV, such a sale would be based on the fair market value of the Line for its highest and best use, which would be determined by an appraiser. Mr. vom Eigen indicated that CV would only pay an amount based on the going concern value of the Line. In light of our differing views on the value of the Line, further discussion appeared to be useless.

While it was not apparent at the time, it has now become clear that neither Amtrak nor CV had any interest in negotiating in good faith over the future of the Montrealer, because they had already entered into negotiations regarding the initiation of condemnation procedures.

It is further apparent that Amtrak at no time had any interest in either acquiring the Connecticut River Line or funding the true costs associated with the operation of the passenger service over the Line. Instead, Amtrak chose to permit Canadian National Railway ("CN"), through CV, to utilize the condemnation powers vested in Amtrak to further pursue CN's goals of raiding the traffic base of the GTI system. CN had already asked the Commission for direct access over MEC owned track to reach many of the GTI system's major customers. If CN were successful in gaining direct access to GTI's major customers, that would virtually destroy the GTI system.

In this most recent action, CN is attempting to use Amtrak's eminent domain power to further permit CN to access existing GTI customers, to foreclose the GTI system from attracting new customers to its Connecticut River Line between Windsor and Brattleboro and to permit CN an interchange where none has existed by agreement between CV and B&M for over thirty years. Amtrak is providing an avenue to CN to abrogate the existing trackage rights agreement between CV and B&M. Such abrogation, if approved by the Commission, would result in the loss

of traffic to the GTI system and would weaken its operations in Vermont and New Hampshire.

I am familiar with Amtrak's offer to purchase the Connecticut River Line, as stated in the letter dated March 18, 1988. Following receipt of the letter, neither I nor anyone else at B&M to my knowledge received any calls or any other type of follow up inquiry from Amtrak concerning the offer. We analyzed the offer and concluded that the price was too low. In addition, the proposal was unacceptable from B&M's perspective to the extent that it contemplated transfer of the Line to CV. B&M and CV are direct competitors on the Connecticut River Line, and, as described above, the competitive balance would be completely disrupted by such a transaction.

B&M communicated these thoughts to Amtrak when Dave Fink called Jim Larson on March 25, 1988. Mr. Fink stated that a sale to Amtrak would be very difficult, even assuming a price could be agreed upon, if Amtrak intended to convey the Line to CV. On the other hand, Mr. Fink indicated that B&M was more favorably inclined to sell the southern end of the Connecticut River Line to Massachusetts, because there was no further transfer to any freight railroad involved.

We heard nothing further from Amtrak. On March 29, 1988, Mr. Fink sent a letter to Amtrak explaining that a sale of the Line was unnecessary. The letter did not, and was not intended to, reject the Amtrak offer. It clearly was intended to provide a fair mechanism for negotiations and, if necessary, a determination by the Commission to resolve differences between B&M and Amtrak. The letter was sent in the hope that the parties could immediately begin rehabilitation of the Line and initiate Montrealer service.

There were never any discussions, much less negotiations, between Amtrak and B&M concerning the Amtrak offer to buy the Line. B&M was always ready, willing and

able to discuss a sale, but Amtrak made no effort to do so. In view of the fact that the Amtrak deal with CV had been made several months before the offer of March 18, 1988, Amtrak's reluctance to negotiate was understandable. It is clear that Amtrak did not want to pursue negotiations, but rather wanted to file the Application instead.

B&M is still willing to discuss a sale to Amtrak. If the price offered were fair and B&M's freight operations were properly protected, it would be possible to reach an agreement.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS :
: ss:
COUNTY OF MIDDLESEX :

F. Colin Pease, being duly sworn according to law, deposes and says that he has read the foregoing Verified Statement, that he is familiar with the contents thereof and that the statements therein are true and correct to the best of his knowledge, information and belief.

[Signature]
F. Colin Pease

Sworn to and subscribed
before me this [27] day
of May, 1988

[Signature]
Notary Public

Before the
INTERSTATE COMMERCE COMMISSION
Washington, D.C.

Finance Docket Nos. 31250 and 31259

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)—APPLICATION UNDER SECTION 402(d) OF THE RAIL PASSENGER SERVICE ACT—FOR ORDER REQUIRING CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

VERIFIED REBUTTAL STATEMENT OF GERALD L. MAAS

My name is Gerald L. Maas. I am President of Grand Trunk Corporation ("GTC") and its railroad subsidiaries, including Central Vermont Railway, Inc. ("CV"). My business address is 1333 Brewery Park Boulevard, Detroit, Michigan 48207-2699.

I began my railroad career with the New York Central in 1955. My first job with the Grand Trunk organization was General Manager of the CV in 1976. In 1977, I became General Manager of the Grand Trunk Western, and subsequently held positions as Assistant Vice President of Operations, Vice President of Transportation and Maintenance, Vice President of Operations and Executive Vice President. I was educated at Eastern Illinois University and Harvard Business School.

PURPOSE OF STATEMENT

Witnesses offering testimony on behalf of the Boston and Maine Corporation have made flamboyant allegations about the role played by CV in the plan to restore the

Montrealer service, and have asserted that CV has manipulated Amtrak to use its condemnation powers to further some sinister "goals" of CV's affiliate, the Canadian National Railway ("CN"), to "raid" the traffic base of Guilford Transportation Industries affiliated railroads. They further complain that CV's acquisition of the Connecticut River Line will destroy the "healthy balance" between CV and B&M "which protects the interests of both carriers."

Amtrak will speak for itself. In this statement, I would like to explain CV's interest in the Connecticut River Line, its reasons for agreeing to participate in the transactions the Commission is being asked to approve or exempt, and the involvement of CN—actually, the lack of involvement of CN—in the planning, shaping or promotion of the agreements with Amtrak. I will also address questions raised about the impacts of this transaction upon competition in the geographic market served by CV and B&M and about CV's ability to assume the financial obligations for maintenance of the Conn River Line.

Before turning to these issues, however, I would like to comment upon the tone and perspective offered by B&M's evidence and argument. To read the B&M submission a person with no knowledge of the events which led up to these proceedings would assume that B&M had been providing an acceptable level of service, maintaining the Connecticut River Line and discharging its obligations to its shippers and connecting carriers, just like any responsible railroad. Further, one would gain the impression that Amtrak had sought to impose certain "unique" maintenance requirements on this good citizen without paying for them, and had now—without providing B&M the opportunity to negotiate a resolution of the dispute—instituted a condemnation of this key, strategic portion of its property at the instigation of its competitor which desired to put it out of business.

The facts, of course, are quite different. As previously detailed by Amtrak and CV witnesses, years of deferred maintenance have caused in [*sic*] 33 of the 49 miles of the Brattleboro to Windsor segment to become subject to 10 mph speed restrictions. Numerous efforts to reach negotiated solutions to these maintenance inadequacies have been terminated or ignored by Guilford. Service disruptions caused by the condition of the Line and disputes with B&M's employees have forced shippers to move or use alternate modes of transportation. Amtrak was forced to discontinue the Montrealer service. Guilford diverted overhead traffic off the Line to its parallel D&H route, placed the Conn River Line on its system diagram map as a top candidate for abandonment and suggested to CV representatives and others that condominium development was a more appropriate use for the property than rail use.

We now learn from B&M that this was all a mistake. The "experiment" of utilizing the D&H route for CP overhead traffic—a route which B&M now asserts is superior for passenger service—somehow, without explanation, has failed. The CP interchange traffic has been moved back to the Conn River Line in the days that followed the filing of Amtrak's a[illegible]ion. The Conn River Line, without explanation as t[illegible]y it was placed on the map. is removed from the s[illegible]n diagram map days after notice of this proceeding was filed. The property is now not only suitable for rail use, but an important link in the B&M system.

But one can ignore all of that. This case has nothing to do with Guilford's shortcomings. As Witness Fay puts it: "In its simplest terms, this case is essentially an opportunistic attempt by CN and its subsidiary, CV, to obtain additional marketing advantages in territory now served by the GTI system." (V.S. pg. 4). Guilford's version of what is happening could almost be amusing, in a macabre sense, if not for the fact that B&M's actions have seriously

threatened the very survival of CV and rail transportation service in the region.

CV'S ROLE IN ASSISTING RESTORATION OF MONTREALER

CV's objectives in these proceedings are to restore an acceptable level of maintenance to permit efficient operations across the Conn River Line for its freight business and to permit resumption of Montrealer service. CV has no designs on B&M's traffic for which we presently do not compete. We would have preferred that B&M had honored its commitment to Amtrak and had maintained the Line, with CV contributing its share of the expenses.

CV did not leap to the conclusion that it would acquire the Line in conjunction with Amtrak. However, we came to the realization late last summer that if there were to be any hope of getting the rehabilitation work on the Line completed during 1988, working with Amtrak under §402(d) of the Rail Passenger Service Act (RPSA) was the only way. We came to this realization after our own inquiries with Guilford management indicated that a negotiated resolution was not possible, and after supporting legislation which appropriated $5 million to upgrade B&M trackage between Springfield and White River Junction failed to result in an agreement between Amtrak and B&M.

Amtrak and CV have parallel, but not identical, interests in achieving the resumption of Montrealer service. CV views Amtrak as a customer for whom CV provides facilities and services for consideration which covers our costs and provides an opportunity to earn on-time incentive payments which go to our bottom line. When the Montrealer service was discontinued, we sought to promote its restoration on terms acceptable to Amtrak and, at least initially, to B&M. CV's primary business is hauling freight, and we were very mindful of the positive consequences

for our freight operations of the resumption of the Montrealer and the upgrading work which will precede it.

After efforts by Amtrak and B&M to negotiate a solution to their impasse over upgrading the Line and operation of the train failed by the end of the summer of 1987, CV's representatives responded favorably to the suggestion from Amtrak representatives that CV reimburse Amtrak for the costs of acquiring B&M's interests in the Conn River Line once Amtrak acquired those interests utilizing its authority under §402(d) of RPSA. Amtrak specified that it would proceed only if CV and GTC assumed the ownership obligations for the Line and agreed to fully reimburse Amtrak for the purchase price. Once CV acquired the property, Amtrak would devote a portion of the funds appropriated by Congress for restoration of Montrealer service to the upgrade of the Windsor to Brattleboro segment, provided CV would agree to a long-term operating contract.

Although I was not a direct participant, I did receive regular reports which confirmed that the negotiations during the fall and winter over the terms of the various contracts were protracted, at times contentious and definitely arms length. One area of debate which was brought to my attention was Amtrak's insistence that, under the contract governing operation of the Montrealer, CV not receive the full range of payments for the maintenance and other expenses incurred by virtue of the operation of the train south of White River Junction.

Unlike B&M, CV does not regard Amtrak's maintenance requirements to be "unique" or unjustified for freight operations. We maintain our entire main line at FRA Class III, even in areas where Amtrak has never operated, but we have looked to Amtrak to compensate CV for the additional wear and tear and other costs caused by its operations. Amtrak recognized that had B&M decided to maintain the line at acceptable standards under the exist-

ing trackage rights agreement, CV would have incurred a proportionate share of the maintenance and capital costs. In Amtrak's view, it was conferring a benefit upon CV by upgrading the line with Federal funds which would assist CV's freight operations, and that it should receive concessions in terms of operating expenses for the train.

A compromise was reached whereby CV would commit to maintain its trackage south of White River Junction to Amtrak's standards for twenty years, waiving for the first ten years of the operating contract reimbursement for wear and tear on the rail line south of White River Junction. However, CV would retain payments for other costs incurred at modified levels. This is simply one example of the give and take which occurred over the period of the negotiations on a number of provisions in the various agreements. The assertion that Amtrak is acting as CV's stalking horse in these proceedings cannot be supported by a review of these contracts which reflect a balancing of the interests of both parties.

As I mentioned previously, CV shares Amtrak's desire to restore Montrealer service because it has been profitable to CV. It is no secret that CV's (and B&M's) freight operation will also benefit from this transaction. Our costs will be reduced and our opportunities for business development will be revived with the elimination of the cancer of deferred maintenance on this trackage that is essential for moving across the CV system. CV's General Manager, Phillip C. Larson, will provide greater elaboration on these savings. However, these benefits cannot disqualify this transaction or preclude Amtrak from exercising its authority under the RPSA. Amtrak has achieved its public purposes in negotiating a series of arrangements for restoring rail passenger service in this region on a long-term and economical basis.

COMPETITION WILL BE ENHANCED BY CV ACQUISITION OF LINE

B&M, though its attorneys and witness Fay, claims that Amtrak's plan to convey to CV the property acquired from B&M is anticompetitive for two reasons. First, CV's acquisition is said to destroy the long standing relationships governing the alternating segments of the Connecticut River Line, relationships which B&M characterizes as a "healthy balance." Second, B&M claims that the trackage rights agreement proposed by Amtrak and CV provides opportunities for CV to raid traffic presently handled by B&M or opportunities which B&M presently enjoys for development of new traffic on the line which threatens B&M's ability to survive as a competitor in the region.

In response to the second assertion, acquisition of B&M's traffic at local stations is not and has never been an objective in connection with the arrangements it has negotiated with Amtrak. If B&M goes out of business in this region, it will be its own doing—not CV's. Provisions in trackage rights agreement for providing joint competitive access to the Green Mountain Railroad interchange at Bellows Falls and the standby right to serve B&M's local customers in the event B&M's service deteriorates to unacceptable levels were inserted in response to concerns by the State of Vermont in exchange for the support and cooperation reflected in our Memorandum of Understanding with the State. Nevertheless, Mr. Phillip Larson will discuss further modifications to the trackage rights agreement to which CV would agree in order to address certain of the unintended consequences described by Mr. Fay. The balance of my comments on the competitive issues will be directed at B&M's first argument, and CP's expressions of concern over its rights to "competitive access" via the Conn River Line, which serves as one of the routes over which its shippers can route traffic to and from the U.S.

CV and B&M have since the turn of the century operated on alternating segments of each other's trackage in the Connecticut River Valley. Mr. Fay is quite correct in noting that, although the two carriers competed for overhead traffic to and from Canada, the relationship was as much cooperative as it was competitive. But regardless of whether the carriers competed or cooperated, the most prominent element of the relationship was interdependence. Both carriers depended upon the Connecticut River Line for transporting their traffic and had incentives to maintain their respective segments. If a slow order were placed on the Line, both our trains would be stalled.

When Guilford filed its application to acquire the B&M in 1981, CV and B&M operated coordinated freight and piggyback trains which were designed to meet Conrail, D&H and highway competition. That cooperation has ceased as we said it would when CV originally opposed the Guilford consolidations. However, the interdependence remains. The deterioration in the Windsor to Brattleboro segment documented by Amtrak's witnesses has impacted the service rendered by both companies. B&M appears to be indifferent about the problem, perhaps because their dependence is mitigated for a portion of the traffic by the availability of the alternative D&H route. Given B&M's performance since it was acquired by Guilford the historic relationship can no longer be regarded as a "healthy balance."

With the acquisition by CV of the Conn River Line interests from Amtrak, CV's dependence upon B&M will cease. B&M's management practices will no longer be able to prevent CV from becoming an effective competitor. Nevertheless, the "competitive issues" raised by B&M and CP are trivial and without substance. They can be fully addressed in the present context, without the need for a full blown consolidation proceeding.

The Commission reviewed competition in the geographic market served by CV in the context of Guilford's acquisition of the D&H. The Commission found that even though Guilford would control three of the four rail routes between eastern Canadian points and New England, the middle Atlantic states, and the South, competition would not be impaired primarily because of the strong competition from motor carriers. CV's acquisition of the Conn River Line will eliminate B&M's control over the CV route, but it will not reduce competition in this market. Indeed, the plan will permit CV to compete for traffic which we have no hope of attracting to our route given B&M's maintenance and dispatching practices.

B&M and CP, however, do not become dependent upon CV as a result of this transaction. The D&H route south of Rouses Point, New York, provides an alternative for most of the Canadian traffic, notwithstanding Mr. Fink's failed "experiment" with such routing. CP, of course, retains its option for routings via Conrail over its Massena line. Motor carriers will continue to provide stiff competition for all of this business.

B&M traffic to and from paper mills in New Hampshire can only travel over the Conn River Line. However, unlike Guilford for most of CV's overhead business, CV has no opportunity to divert this traffic to its system and has no financial incentive to interfere with B&M's operations across the Conn River Line. Indeed, our financial incentives are to attract as much B&M and CP traffic to this route in order to share maintenance expenses on the segments which CV presently owns. Although, under the proposed trackage rights agreement, B&M's maintenance payments to CV will be capped after three years on the segment between Brattleboro and Windsor, our agreements for the White River Junction to Windsor and Brattleboro to East Northfield segments contain no such cap.

Maintenance on the Conn River Line will improve B&M service and permit it to retain traffic which it otherwise is almost certain to lose to motor carriers under its present policies. Its competitive capabilities should also improve.

CV has committed in the trackage rights agreement with B&M to dispatch the Conn River Line without prejudice to any freight carrier. That obligation is solemnly made on the record of this case. If I or my successors deviate from that policy, B&M or its successor can come to this Commission and seek appropriate redress.

CV's acquisition of the Conn River Line is so clearly pro-competitive that we consciously have proceeded with our petition for exemption with the understanding that there will be no immunity from the antitrust laws conferred by the Commission's action. The Commission should grant our petition because the public interest requires it and because no useful purpose would be served by a more extended regulatory proceeding.

CV'S AFFILIATION WITH CANADIAN NATIONAL

It is no secret to this Commission that CV is affiliated with CN, and that CN is a crown corporation of Canada. B&M would have this Commission believe that these facts have relevance to the issues which the Commission must decide. I respectfully suggest that they do not.

The stock of CV is owned by GTC, which is headquartered in Detroit. GTC and its subsidiaries are run entirely by U.S. management, without interference by GTC's parent - CN. Grand Trunk coordinates its operations and marketing with CN, but Grand Trunk has similar coordinations with unaffiliated carriers as well—most notably the Burlington Northern. CN management believes that the best way for its U.S. subsidiaries to survive in the transportation marketplace of the U.S. is to permit their U.S. managers to operate independently and in the interests of the companies they run.

CV's decision to proceed with Amtrak was made entirely by GTC and CV management with no involvement, direction or correspondence with CN management. CV and GTC needed authority from their boards to enter into the Acquisition Agreement with Amtrak. Mr. Ronald E. Lawless, Chief Executive Officer of CN, sits on the executive committees of GTC's and CV's board. My January 6, 1988 memorandum to Mr. Lawless, as well as copies of Mr. Walker's October 22, 1987 letters to Mr. Sullivan of Amtrak and Mr. Fink of Guilford,[1] were to him in his capacity as Chairman of CV's board. After a brief meeting where the negotiations with Amtrak were explained to him, the executive committees authorized GTC and CV to proceed.

As far as I and my top management know, no other communications with any officer or employee of CN have occurred involving the plan to acquire the Conn River Line. Certainly, we have received no instructions or direction from CN management concerning the Conn River Line, except that I know Mr. Lawless has approved our plan after we exhausted all measures short of acquisition to resolve CV's problems of maintenance and dispatching on the Line. The transactions negotiated with Amtrak are designed to achieve CV corporate objectives and CN simply has had no involvement whatsoever.

CV'S ABILITY TO FULFILL COMMITMENTS UNDER AMTRAK CONTRACTS

B&M suggests that because of the additional capital and maintenance burdens assumed by CV, and given our marginal financial performance in recent years, CV will not be able to absorb the costs incurred as a result of its obligations to Amtrak. Mr. Phillip Larson will provide specific estimates of the costs of capital and maintenance programs which CV anticipates and an explanation of the sources of funds which will be available to cover those expenses. I am satisfied that CV's financial condition will not worsen as a result of the acquisition of the Conn River Line interests, and that CV will be able to honor its commitments to Amtrak given what I know about the future.

[1] B&M attached the first two documents to its submission, but failed to supply Mr. Walker's letter to Mr. Fink. I am correcting that omission by attaching it to this statement. CV has never received a response to this invitation for discussion.

I would like to reflect on two general issues of corporate philosophy which have made our decision to invest in the Conn River Line interests, with the long-term maintenance commitments to Amtrak, easier to make. CV views the Conn River Line segment as an integral and essential portion of its operation. In its present state of repairs, the company cannot survive for long. If we want to remain in business, we have no choice but to make the investment. Of course, that does not mean we can or will pay any price to achieve that result.

We also do not believe we can compete with our rail and motor carrier competitors in this region for the traffic we handle with anything less than FRA Class III track maintenance. CV wants to attract intermodal traffic and has made a major commitment to bulk distribution centers. Our ability to compete in these markets requires 40 mph freight operations at a minimum. Therefore, CV does not regard Amtrak's maintenance requirements as any greater than the costs required for providing good freight service. They are a cost of doing business in the market in which we compete.

We believe that CV's acquisition of the Conn River Line property interests complies fully with the rail transportation policy in that it will promote safe and efficient rail operations in the region we serve, permit effective competition among rail carriers and with other modes, improve effective coordination with other carriers, including B&M, and promote operation of transportation facilities and

equipment without detriment to the public health and safety.

CV currently operates over the Conn River Line, and the rights we are acquiring are simply the ability to maintain the Line to our corporate standards, to interchange with one regional carrier at Bellows Falls and to dispatch the operations over the Line in a nondiscriminatory fashion. These changes are limited in scope and have no potential for attaining or abusing market power. I would hope the Commission could act quickly and affirmatively on Amtrak's application and CV's petition for exemption.

VERIFICATION

County of Wayne)
) ss:
State of Michigan)

Gerald L. Maas, being duly sworn, deposes and states that he has read the foregoing statement, knows the facts asserted therein, and that the same are true and correct to the best of his knowledge and belief.

Executed at [Detroit, Michigan,] this [2nd] day of June, 1988.

[Signature]
Gerald L. Mass

Subscribed and sworn to before me
this [2nd] day of June, 1988

[Signature]
Notary Public

My Commission Expires: [Date]

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C.

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)—CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

VERIFIED REBUTTAL STATEMENT OF JAMES L. LARSON

My name is James L. Larson. I have previously submitted a verified statement on behalf of Amtrak in this proceeding. The purpose of this rebuttal statement is to respond to certain statements submitted by Boston and Maine Corporation (B&M) and its witnesses in the argument and evidence presented by B&M in this proceeding on May 31, 1988.

1. On page 17 of its argument, B&M states: "Amtrak has stated that its only goal is to resume operation of the Montrealer." This statement is incorrect. Before committing millions of dollars in capital money, Amtrak has insisted on knowing precisely what its future cost of operations would be and has demanded assurances that the rail line would in fact be maintained in a satisfactory condition at a reasonable cost to Amtrak. Amtrak has never been willing to spend the $5 million in federal funds available to it for restoration of the Montrealer service without assurances that (a) the work necessary for resumption of service would be performed promptly and efficiently and (b) that, when the work was completed, Amtrak would be able to provide rail passenger service on the Connecticut River Line on a long-term basis that ensured both reliable and economical operations. Prompt

restoration of the track and restoration of the Montrealer service alone were not sufficient.

2. On page 14 of its argument, B&M states as follows: "B&M has continued to express its willingness to use the $5,000,000 in federal funds to upgrade the Connecticut River Line and to operate the Montrealer on reasonable terms and conditions." B&M's repeated reference to "reasonable terms and conditions" simply begs the fundamental issue of the basis upon which Amtrak might be allowed to operate on the Connecticut River Line in the future. In addition, B&M has stated that the amount of rehabilitation work that it could perform on the rail line would be far less than Amtrak has obtained commitments from CV to perform. Mr. Fay, who is not an engineer, states at page 21 that $3.1 million "will not bring the line segment to acceptable standards to permit passenger trains to operate at speeds desired by Amtrak." Amtrak's engineering staff has determined that the required work can be performed for $3.1 million. More importantly, CV has committed to perform the scope of work agreed upon by the parties, and Amtrak will not have to pay more than $3.1 million regardless of CV's ultimate cost. Once the work is performed, CV will maintain the line in the restored condition for 20 years, whereas B&M refused to make any commitment for more than one year.

3. At page 30 of its argument, B&M states that "Amtrak has no financial stake in the transaction," aside from bearing a portion of the expenses in this legal proceeding. This statement is incorrect. Amtrak is providing more than $3 million in funds which have been appropriated specifically for our benefit. In exchange for this investment, Amtrak is obtaining rehabilitation of the rail line, a guarantee that the rail line will be properly maintained for a period of 20 years, and a commitment during this period to allow operation of Amtrak trains on the Connecticut River Line at a reasonable, predetermined compensation level.

4. At page 55 of its argument, B&M states that "resumption of passenger service by Amtrak is not the overriding goal" of the transaction between Amtrak and CV. Prompt resumption of passenger service with adequate long-term guarantees concerning reliable and economical operation on this route are Amtrak's *only* goals in this transaction. In order to achieve these goals, we support the conveyance of the rail line to CV, because it has made the short-term and long-term commitments required to protect our interests.

5. B&M's argument and supporting verified statements are full of statements to the effect that Amtrak has not demonstrated there is a lack of agreement between the parties that is sufficient to permit Amtrak to proceed to the Commission pursuant to Section 402(d) of the Rail Passenger Service Act for condemnation of the Connecticut River Line. Amtrak can never prove that it is absolutely impossible for Amtrak and B&M to agree on some arrangement for the sale of the Connecticut River Line. However, all of B&M's conduct during discussions and negotiations in 1987 and 1988 has led Amtrak to believe that B&M and Amtrak have widely divergent views as to what represents reasonable terms and conditions and compensation, and that it would be foolish to expect the parties to agree unless something happens to fundamentally change the views of one or both parties. Amtrak has offered compensation to B&M in excess of the amount we feel they would be entitled to in a proceeding before the ICC pursuant to Section 402(d). Since that time, Amtrak and its contract partner CV have expended considerable funds and effort to pursue this proceeding before the Commission and its agreements with CV. In order for the parties to reach agreement, B&M would have to persuade Amtrak that it will offer Amtrak a price and other terms and conditions that are more favorable to Amtrak than the result Amtrak can reasonably hope to receive from the Commission and its agreements with CV.

It is interesting to note that on page 4 of his verified statement, David Fink says that B&M has "not yet completed an appraisal" and does not really know what the value of the line is. Regardless of the lengthy history of dealings with Boston & Maine prior to March 18 which lead Amtrak to believe that it was unlikely that we could reach agreement with B&M for sale of the Connecticut River Line, the conduct of B&M subsequent to that time has clearly confirmed our opinion that we will not be able to agree on reasonable terms for purchase of the Connecticut River Line, and most certainly the discussions suggested by B&M would proceed slowly. B&M has been free throughout the entire period since March 18 to make a constructive proposal to Amtrak for sale of the line; instead, Mr. Fink simply continues to assert that we have not engaged in negotiations that are satisfactory to them. It is hard to imagine how we could have conducted such discussions since Mr. Fink still says he has no idea what the rail line is worth. Amtrak had a need to take steps to ensure the prompt upgrading of the line to permit restoration of Montrealer service on a basis that would ensure its long-term economical and reliable operation, and the authority available under Section 402(d), along with the firm commitments we have received from CV, offer us precisely the relief we require. Even if the parties might conceivably agree at some future time, such future agreement would not be satisfactory since immediate action is required both the [*sic*] prevent further degradation of the rail line and to restore Montrealer service as promptly as possible.

Without the CV's promise to pay us at least $1 million for the rail line, Amtrak would have had virtually no ability to negotiate with B&M for purchase of the Connecticut River Line. While Amtrak's latitude in negotiation is constrained somewhat by our financial limitations and the provisions of agreements we have entered into in an effort to solve the problems presented by the deterioration of

the Connecticut River Line, Amtrak retained the ability to negotiate with B&M concerning terms for acquisition of the line even after we filed our case in this proceeding on April 4, 1988. It is significant that B&M has never made a serious proposal for sale of the Connecticut River Line to Amtrak. For example, in the limited discussions Amtrak had where sale of the line was mentioned, B&M representatives suggested that the value of the line lay in its potential for condominium development, which clearly has no relationship to the value Amtrak believes is appropriately attributable to the line. It also belies an interest in continued operation of the line by B&M for freight service.

6. On page 3 of his statement, Mr. Fink states "Until March 18, 1988, Amtrak had always taken the position that it had no interest in purchasing the Connecticut River Line." The same point is made several times in B&M's argument. In my discussions with B&M representatives, I had stated that Amtrak alone could not afford to purchase the Connecticut River Line for the limited operation of only two passenger trains daily. In order for the line to be viable for passenger train operations, it clearly must have a vital freight operation that bears the preponderance of the operating and maintenance costs. CV understands this and has been willing to make the long-term commitment to maintain the Connecticut River Line in a condition that will permit both freight and passenger trains to be operated on an efficient basis.

7. In its argument and in the verified statement of Gordon Fay, the B&M asserts that "Amtrak has no need to use the Connecticut River Line" (Fay page 14). Among other things, B&M contends that the service through Connecticut, Massachusetts, Vermont, and New Hampshire provided by the Montrealer is unimportant, and that service from New York to Montreal via Albany and over the Delaware and Hudson would be an appropriate substitute for the restoration of Montrealer service.

Amtrak is legally responsible for operating the nationwide system of rail passenger service established by Congress, as that system may be modified in compliance with the provisions of Title IV of the Rail Passenger Service Act. Amtrak has determined that it is necessary to restore operation of the Montrealer service between Washington and Montreal via New York City and New Haven; that service restoration requires use of the Connecticut River Line. The arguments presented by Mr. Fay and B&M as to why they might provide a different service on a different route are irrelevant in this proceeding. In addition, the B&M presentation contains the following assertions that are either incorrect or misleading:

- At page 10 of his statement, Mr. Fay asserts the need to transfer between Penn Station and Grand Central Station in New York City is a "minor inconvenience". Amtrak strongly disagrees with this assertion. Amtrak believes the availability of direct through service from the major population centers south of New York City to points in northern New England and Montreal is very important.
- Mr. Fay's analysis of the ridership of this train focuses solely on the traffic to and from eight relatively small cities in Vermont and northern Massachusetts, as well as the ridership to and from the end point in Montreal. It ignores the through service provided from points south of New York City to Montreal, as well as the direct service from points between New York City and Northampton (i.e., large, populous segments of the states of Connecticut and Massachusetts) to Montreal and to other points in northern New England.
- Amtrak is not aware at this time that another train between New York Grand Central Station and Montreal would be warranted or viable on the route already served daily by The Adirondack.

Congress has not entrusted either to the Interstate Commerce Commission or private litigants any authority to determine what represents an appropriate route structure for Amtrak. The rambling efforts of Mr. Fay and the B&M to assert that either the Montrealer service simply should not be operated at all or that it can be eliminated and replaced with a different train serving a considerably different market indicate the wisdom of the Congress in reserving these decisions to Amtrak within the parameters set by Congress.

8. Section 1.2 of the proposed "Trackage Rights Agreement Between Central Vermont, Railway Inc. and Boston & Maine Corporation", which is attached to my previous statement in this proceeding, provides that B&M shall have the sole right to serve shippers currently on the line, provided that CV shall also be entitled to serve such a shipper in the event "such shipper initiates a request to CV, or to the ICC, that CV provide service to its facility because of unsatisfactory service by B&M". While this proviso was primarily intended to enhance competition by ensuring that an alternate carrier would be available in the event that B&M failed to provide satisfactory service on the Connecticut River Line, Amtrak is concerned at the lack of clear standards and procedures in the proposed exception. As a result, we have approached CV requesting that the proposed Trackage Rights Agreement be modified to delete this exclusion, and CV has agreed to accept such a modification.

9. In response to B&M's objection that section 14.1 of the proposed Trackage Rights Agreement prohibits B&M from assigning its trackage rights without the prior written consent of CV, Amtrak and CV have agreed that this provision should be modified to add a proviso that such consent may not be unreasonably withheld.

10. Finally with respect to the proposed Trackage Rights Agreement, Amtrak and CV are agreeable to modifying

the proposed agreement to specify that B&M would not be obligated to pay any portion of the cost of rehabilitating the line to the standards specified in the rehabilitation agreement between Amtrak and CV, even if such cost ultimately does exceed the $3.1 million contribution being made by Amtrak to the cost of the rehabilitation.

11. B&M has asserted that the economics of the total transaction negotiated by Amtrak and CV are such that CV might somehow be unable to fulfill the commitments it is making to Amtrak and continue to operate a viable freight service on its entire system. Prior to entering into the series of agreements with CV for the acquisition, rehabilitation, and long-term operation of the rail line, Amtrak carefully reviewed the ability of CV to fulfill those commitments. Amtrak has satisfied itself that the savings CV will realize through improved operating efficiencies as well as the resumption of Amtrak operations, with the substantial potential for earning incentive payments from Amtrak for high quality performance, will have a favorable economic impact for CV, and that CV should be able to fulfill its obligations under these new agreements. CV will also be able to resume operating the Montrealer on the remainder of its line between East Northfield and the Canadian border. Amtrak believes that any risks associated with CV's financial condition are outweighed by the potential value of the negotiated arrangement to Amtrak and the complete lack of satisfactory alternatives for restoration of the Montrealer Service.

12. At page 50 of its argument, B&M asserts that "a section 402(d) conveyance would significantly impair B&M's common carrier obligations," because Amtrak would not propose to directly grant trackage rights to B&M. It should be clear that if CV is prevented by the ICC from acquiring the property from Amtrak, Amtrak will not itself acquire the property from B&M.

13. On page 37 of its argument, B&M asserts that if the Commission permits the transaction worked out between Amtrak and CV to be implemented, there may be no limit to the ways in which Amtrak and other freight railroads might conspire to abuse the authority of Section 402(d) of the Rail Passenger Service Act. While as a factual matter there is no cause for concern that Amtrak will abuse the authority conferred by Section 402(d), it is worth noting that if a transaction such as the one Amtrak and CV have negotiated is to work, the Commission must either approve or exempt the reconveyance by Amtrak to the acquiring freight railroad. That aspect of ICC jurisdiction should ensure that there will be no abuse of Section 402(d) authority by Amtrak.

14. B&M's argument and supporting statements are full of assertions that control of the Connecticut River Line by CV will adversely affect competition. It is Amtrak's firm opinion that the most unhealthy circumstance for a competitive transportation system is the existence of a rail line on which the speed of operations is restricted to 10 mph on more than half of its length. The acquisition and upgrading of the Connecticut River Line by CV can only help competition and transportation generally in New England.

15. The relief Amtrak is seeking in this proceeding is prompt control of the Connecticut River Line with ultimate transfer of ownership from B&M at the price determined by the ICC. The statute is silent on the precise mechanics to be applied in order to effect such a result, and the Commission has not issued any implementing regulations pursuant to the authority of section 402(d). As a result, Amtrak has developed a specific set of requirements to be embodied in orders of the Commission which will carry out the purpose of the statute in the event the Commission determines that Amtrak's request for condemnation should be granted. Copies of these proposed orders are attached to this statement as Exhibit 1.

16. On page 2 of his statement, Mr. Pease states that "Amtrak recognized that the track condition was perfectly adequate for B&M's freight service." That is an incorrect statement. While Amtrak recognizes that a freight railroad may reasonably choose to operate freight service on track that is maintained to a condition below FRA Class III, the deteriorated condition of the Connecticut River Line, with the majority of the trackage slowed to 10 mph operations, is clearly not suitable for operation of anything but the poorest quality freight service.

VERIFICATION

I, James L. Larson, being duly sworn, depose and state that I have read the foregoing rebuttal statement, know the facts asserted therein, and that the same are true and correct to the best of my knowledge and belief.

Executed on this [3rd] day of June, 1988.

[Signature]
James L. Larson

Subscribed and sworn to before me this [3rd] day of June, 1988.

[Signature]
Notary Public

My Commission Expires: [July 31, 1989]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 31250

National Railroad Passenger Corporation—Conveyance of Boston and Maine Corporation Interest in Connecticut River Line in Vermont and New Hampshire

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Finance Docket No. 31259

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation

VERIFIED STATEMENT OF F. COLIN PEASE

My name is F. Colin Pease, and I am Vice President—Governmental Affairs for Boston and Maine Corporation ("B&M"). I submitted a Verified Statement earlier in these proceedings. The purpose of this Verified Statement is to provide information concerning an offer to purchase the Connecticut River Line and an offer to purchase B&M's interest in the passenger station at Bellows Falls, Vermont.

There is a passenger station at Bellows Falls, Vermont which is owned jointly by B&M and the State of Vermont. B&M has a two-thirds interest in the station, and Vermont owns the remaining one-third interest. The station is a brick structure and is in reasonably good condition. It used [*sic*] currently used by B&M and by the Green Mountain Railroad.

Within the last month, Glen Davis, the President of Green Mountain Railroad, advised me that Green Mountain would like to purchase B&M's two-thirds interest in the passenger station at Bellows Falls. The Green Mountain line connects with the Connecticut River Line at Bellows Falls. Mr. Davis indicated that Green Mountain would be prepared to pay fair market value for B&M's interest in the station.

In my earlier Verified Statement, I described discussions and correspondence between me and Robert vom Eigen, an attorney representing Central Vermont Railway, Inc. ("CV"). In these discussions and correspondence, we considered the possibility of a sale of the Connecticut River Line to CV. The discussions did not progress beyond the point of agreeing to disagree over the proper means of valuing the Connecticut River Line. CV contended that the Line should be valued for continued rail use, and I expressed the view that any purchase price should be based upon the highest and best use, whatever that might be.

CV renewed its interest in purchasing the Connecticut River Line in a letter dated January 13, 1988, from Robert A. Walker to the President of B&M, David A. Fink. A copy of this letter is attached as Exhibit A to this Verified Statement. It is interesting that this offer to purchase was made at a time, as we learned later, when CV and the National Railroad Passenger Corporation ("Amtrak") had already been planning for months to have Amtrak acquire the Connecticut River Line and convey it to CV.

As described in the attached letter, CV was offering to purchase the Connecticut River Line for $1.3 million. The $1.3 million consisted of waiving CV's judgment in the amount of approximately $600,000 against B&M in connection with certain damage to CV's Sheldon bridge and payment of $700,000 in cash. The other provisions of the offer were similar to the proposal which Amtrak and CV have now put before the Commission. B&M would have

been able to continue to operate on the Connecticut River Line and to serve existing shippers and would have been required to pay rent and its share of the expenses of operating and maintaining the Line.

B&M did not enter into discussions with CV concerning this proposal. We believed that the $1.3 million proposed purchase price was far below the fair market value of the Connecticut River Line.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS :
: ss:
COUNTY OF MIDDLESEX :

F. Colin Pease, being duly sworn according to law, deposes and says that he has read the foregoing Verified Statement, that he is familiar with the contents thereof and that the statements therein are true and correct to the best of his knowledge, information and belief.

[Signature]
F. Colin Pease

Sworn to and subscribed
before me this 29th day
of June, 1988

[Signature]
Notary Public

[Exhibit A To June 29, 1988 Pease Statement]

GRAND TRUNK CORPORATION
1333 Brewery Park Blvd.
Detroit, MI 48207-2699

January 13, 1988

AIRBORNE EXPRESS

Mr. David A. Fink
Chairman & Chief Executive Officer
Guilford Transportation Industries, Inc.
Iron Horse Park
North Billerica, MA 01862-1690

Subject: *Settlement Of Sheldon Bridge And Connecticut River Line Disputes*

Dear Dave:

I learned through counsel that Guilford has proposed to satisfy the judgment involving the Sheldon Bridge, which amounts to approximately $600,000 including interest, by permitting CV to set off joint facilities payments otherwise owed to B&M for use of the Connecticut River Line between Brattleboro and Windsor, Vermont until such judgment is satisfied. Although your proposal is not acceptable to CV, we do believe the Sheldon Bridge judgment can provide a means for resolving the Connecticut River Line issues identified in my October 22, 1987 letter to you.

To respond to your proposal, the current level of deferred maintenance on the Windsor to Brattleboro section of the Connecticut River Line has imposed costs upon CV. Even if joint facilities payments were owed to B&M, the judgment would not be satisfied for nearly two years given the payments owed by B&M to CV for use of the adjacent segments of the Connecticut River Line, and the current level of payment withheld by CV.

As an alternative resolution of our differences, we propose that the Sheldon Bridge judgment be used as a down payment on CV's acquisition of certain of B&M's interests in the Connecticut River Line. The current situation on that line is intolerable. The condition of the line is deteriorating. When we bring these conditions to your attention, the response has been either to impose additional slow orders or to direct our track inspectors to discontinue their monitoring of the condition of the line. CV would like to purchase the right to control maintenance and dispatching on the line.

Specifically, CV is prepared to offer $700,000 in cash plus the Sheldon Bridge judgment to acquire B&M's fee interest or other rights in the rail line and adjacent rail properties between the Windsor depot in Windsor (B&M MP 108.9) and Brattleboro (B&M MP 60.1). For this amount, CV would also acquire the right to dispatch all segments between White River Junction and East Northfield, Massachusetts. Under this proposal, B&M would retain the right to serve existing shippers and interchange traffic along the line and be obligated to share expenses of maintenance and operations of the line on an equitable basis. The rental fee would be 7.5 percent of the purchase price plus betterments paid for with CV funds. These rights would be assignable only with CV's prior approval.

Dave, I think we would both agree that it would be desirable to resolve our differences outside the courtroom, and I would hope to hear from you by January 22, 1988.

Sincerely,

Robert A. Walker

Copy to:
Ellen Fallon, Esq.
Robert I. Schellig, Jr., Esq.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 31259

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation

VERIFIED STATEMENT OF F. COLIN PEASE

My name is F. Colin Pease, and I have submitted two other verified statements in these proceedings. The purpose of this Verified Statement is to discuss certain competitive aspects related to the attempt by Canadian National ("CN") and its subsidiary, Central Vermont Railway, Inc. ("CV"), to acquire the Connecticut River Line from Boston and Maine Corporation ("B&M").

The Interstate Commerce Commission is faced with the requirement that two decisions be made on or before August 8, 1988. The first is to determine the value of the Connecticut River Line between Brattleboro and Windsor, Vermont (Finance Docket 31250), and the second is to determine whether the CN rail system should be permitted to acquire the Connecticut River Line from the National Railroad Passenger Corporation ("Amtrak") under an exemption procedure (Finance Docket 31259). The Commission has been told by Amtrak that a low valuation and a positive decision on the exemption request are essential if Montrealer service is to be resumed between Springfield, Massachusetts and White River Junction, Vermont. The Amtrak assertion is not only incorrect, but it masks the gravity of the decision faced by the Commission and attempts to reduce the decision process from a critical eco-

nomic and competitive review of the issues to an assessment of the political winds. The exemption decision has become even more critical with the recent bankruptcy of B&M's affiliate, Delaware and Hudson Railway Company ("D&H").

AMTRAK DOES NOT NEED TO PURCHASE THE LINE TO OPERATE THE MONTREALER

If the goal is to provide a mechanism to operate the Montrealer over tracks which are adequate for the speeds that Amtrak desires, that mechanism exists and has existed for many months. B&M has indicated several times in writing to Amtrak that it is willing to enter into an Agreement with Amtrak for the operation of Montrealer service. In addition, B&M has indicated that it is prepared to utilize $5 million in federal funds appropriated for the purpose of upgrading the Connecticut River Line. B&M has determined that the bulk of the funds could be utilized for that portion of the Line north of Brattleboro, Vermont and has held a series of discussions with the Commonwealth of Massachusetts in order to reach an agreement to combine some of the federal funds with State funds to rehabilitate the portion of the Line which lies in Massachusetts. Utilizing these two sources of funds, the Line could be rehabilitated to a condition which would permit the passenger schedules desired by Amtrak.

B&M has indicated that the major obstacle to reaching an agreement for the operation of the train is the determination of a fair level of compensation by Amtrak for the use and maintenance of the track which is associated with the operation of the passenger service. Amtrak has refused consistently to enter into any meaningful negotiations regarding this issue, insisting instead on a per train mile payment which bears little resemblance to the true costs associated with the operation of the train. Acknowledging that this disagreement exists, B&M has indicated a willingness to place this issue before the Commission for

binding arbitration and has indicated a willingness to permit the rehabilitation work to be done while a proceeding is taking place.

If, on the other hand, Amtrak has determined that it is essential to own the Connecticut River Line north of Brattleboro in order to operate the Montrealer it is not precluded from attempting to utilize authority granted by Congress to purchase the Line. There exists at least a plausible argument, though one with which B&M does not agree, that if Amtrak needs the Line and has received the proper approvals, it should be permitted to acquire the Line. If, in fact, Amtrak has properly interpreted the law, they have that right, and B&M, either by Commission order or after review by the courts, will receive compensation which comports with the Constitution. That, however, is not what is happening in this case.

AMTRAK ACQUISITION MASKS TRUE COMPETITIVE ISSUES

Amtrak has clearly indicated that it has no funds to acquire the Line and has no interest in owning the Connecticut River Line for the purpose of protecting the operation of the Montrealer. Indeed, Amtrak has made no long term commitment to the operation of the train. Amtrak cannot make any such valid commitment since each year its very existence is dependent on the appropriation of substantial funds by Congress. Amtrak cannot commit to continue an operation with funds that it has no assurance that it will ever receive.

Indeed, the Interstate Commerce Commission is being asked to approve a transaction which may provide Amtrak a lower cost mechanism for operating the Montrealer in the short-term, because the real acquirerer [*sic*] of the Line—CV—believes that it is to its advantage to absorb a portion of the real costs of operating the Montrealer. Through CV's acquisition of the Line, it will be gaining a substantial benefit—the ability to invade a portion of a

market in which today B&M is a substantial competitor. If successful, it would provide the CN rail system with an opportunity to destroy competition in a portion of the New England rail market, rather than to enhance it.

The CN system has demonstrated over the past years that it has no real interest in promoting efficient competitive rail service in New England. In the past, CN has proposed that it gain access to all of the Guilford rail system's major rail customers in the State of Maine. It has been well documented that if such an action were approved, the Guilford system would over time cease to exist, thereby severely reducing rail competition in the State of Maine and throughout New England. The two trunk line carriers which would control the ingress and egress of all rail traffic into the State of Maine would be the two Canadian roads, CN and Canadian Pacific ("CP"). If CN controlled access to the major customers, it would effectively control the market.

The CN system has also taken actions which were designed to inhibit the Guilford system's ability to improve its productivity and reduce its cost in order to compete in the New England market. When the Guilford system was in the midst of significant turmoil due to a strike and secondary picketing by its employees, CN met with and in some cases distributed to Guilford customers information which, in my view, was designed to disparage and discredit Guilford.

When B&M attempted to lease a portion of the Connecticut River Line to its affiliate, Springfield Terminal Railway Company ("ST"), the CN system again stepped in to attempt to stop the lease. To date, CN has been successful in withholding the benefits of ST operations to Vermont and New Hampshire shippers, causing B&M costs on the Line to be higher than on any other part of the Guilford system.

Finally, the CN system has been working closely with Amtrak since August, 1987 to seize a portion of B&M as well as the business which B&M presently is successful in attracting to the Guilford system over the Connecticut River Line. If CN is successful, it will eliminate the Guilford system as a competitor north of East Northfield, Massachusetts and will weaken Guilford's competitive position in New England.

DELAWARE AND HUDSON BANKRUPTCY

On June 20, 1988, as a result of a decision of an arbitrator, Richard Kasher, D&H was forced to seek protection under Chapter 11 of the Bankruptcy Code. The action removed Guilford from having any ability to control the actions of D&H and indeed left in doubt whether D&H has any future as an operating railroad. While the final decision regarding the future of the carrier cannot be predicted, it is well known that D&H could not have survived since the mid-1970's without the substantial infusion of capital from outside sources. When D&H was acquired in 1984 by Guilford, there were no other buyers. Since 1984, Guilford has invested over $40 million into D&H. The arbitrator's decision placed D&H in a position in which it could no longer generate cash.

It was the practice of the Guilford system to utilize the D&H line between Albany and Montreal as a principal main line to Canada. The Guilford rail system scheduled its through freight trains in a manner which demonstrated that this was a good service route to Canada for its long haul traffic. Another westbound option available to Guilford customers was to route westbound traffic via D&H to Buffalo, where it could then proceed west via various connections.

Both of these options are now in doubt pending a resolution of the D&H bankruptcy, a resolution which will not happen before the time at which the Commission has indicated that it will render a decision on the CV-CN ex-

emption request. The Guilford rail system today faces significantly different options for developing competitive service routes for shippers moving between New England and Canadian destinations. An excellent option available to the Guilford system today is via the Connecticut River Line. Without cost effective access to the Line and existing interchanges at Wells River and White River Junction, the Guilford system will be left with a severe competition disadvantage.

While Guilford also interchanges traffic with the CN system at Danville Junction, Maine, it relies on the Connecticut River Line as a key route for attracting rail traffic to the central New England market. Since the B&M portion of the move is a relatively short haul, with the CN system controlling the long haul, CN/CV will frequently weigh the benefits of encouraging an all rail move to B&M destinations versus utilizing a terminal on CV and transloading to truck to the final destination. By having the ability to have a negative impact on B&M costs, CN will have the ability to "encourage" an increasingly larger share of the traffic to move long haul on CN/CV and eliminate B&M as a participant in the move. When the Guilford system had the ability to offer shippers a competitive long haul route via Rouses Point over D&H, Guilford was able to maintain competitive parity with the CN system. If the Commission were to grant the exemption requested by CV, it would further enhance the ability of the CN system to influence the market, while diminishing the ability of the Guilford system to participate in the traffic.

The CN system earns significant revenues on traffic originating and terminating in New England by virtue of the fact they have an enormous ability to negotiate attractive rates and routes. Giving CN control over the Guilford system's only realistic gateway to Canada for southern and central New England traffic, gives them an ability to limit the amount of traffic flowing over B&M. Such an action would simply weaken the entire Guilford system as

a meaningful competitor throughout much of New England.

In 1987, CV incurred a loss of $0.4 million and in 1986 incurred an operating loss of $0.9 million. In its efforts to seize the Connecticut River Line, it is expending enormous sums of money and effort. It cannot be taking this action unless it sees an opportunity to utilize such an acquisition to render its primary rail competitor, the Guilford system, less competitive than it is today. It is the belief of the Guilford system that the CN rail system is fully cognizant of the competitive benefits which would accrue to CN if it were in a position to own the Connecticut River Line north of Brattleboro. CN would gain access to all B&M traffic on the Line and would effectively render B&M non-competitive in the market, eventually forcing it to withdraw.

CV has argued that neither B&M nor the competitive balance would be adversely affected by a transfer in ownership of the Connecticut River Line, because CV proposes to grant trackage rights to B&M. If CV really believes that it will gain no advantage, why does it want to acquire the Line? If CV is really sincere in its contention that B&M and competition will not suffer, why does CV insist on reversing the roles of B&M and CV on the Connecticut River Line? The answer is that CN and CV recognize the competitive advantages that ownership and complete control of the Line will afford them, especially in light of the loss by the Guilford system of the D&H route.

REGIONAL CARRIERS NEED PROTECTION FROM MEGA CARRIERS

The Guilford rail system is a small regional carrier serving five of the six New England states. It has a character similar to many other regional systems. Its densities are light. It is a short haul railroad, and its terminal costs are high because it does not possess the ability to amortize its costs over a long freight haul.

For example, while Class I carriers in the United States average 12.4 million gross ton miles per mile of road, B&M averages only 2.9 million and Maine Central 1.275 million. In addition, the average length of haul for the Guilford system is also significantly less—188 miles for Guilford system roads versus a national average of 664 miles. The Guilford statistics include D&H, so that Guilford's average haul will be even shorter since the D&H bankruptcy. A count of total carloads handled shows that the railroads of the Guilford system handled less than 1% of total rail traffic in the United States.

Because it is a regional carrier which has many of the associated problems of regionals, the Guilford system has been enduring a two-year program to change the system to make it more efficient and cost effective. These changes have been controversial and are well known to the Interstate Commerce Commission. While controversial, they are absolutely essential if the system is to maintain its competitive position in the New England market and if it is to grow. In the past two years, the Guilford system has incurred losses of significant revenue, placing the carrier in a difficult and vulnerable position, especially in light of the highly aggressive actions of CN. The Guilford system has not had the resources necessary to mount a massive public relations campaign, such as the joint Amtrak-CN forces have mounted, and have been taxed to finance the costs of opposing the Amtrak-CN forces in their attempts to seize the Connecticut River Line. It has mounted that fight, however, because the Guilford system cannot afford to permit CN to take essential traffic and divert it away from the Guilford main line system.

CONN RIVER SHIPPERS DO NOT LACK COMPETITIVE OPTIONS

The one shipper which has actively participated in these proceedings—Windsor Minerals—has indicated that it is doing so because it has not received adequate service from

the Guilford system and that it needs an alternate exchange at Bellows Falls which the CN acquisition would provide. The assertion of Windsor Minerals does not accurately portray the range of competitive options which are presently available to the shipper and misstates the intentions of the Guilford system.

Windsor Minerals today has available a range of transportation alternatives. It can route its traffic via rail over the Green Mountain Railroad to Bellow [*sic*] Falls for interchange with B&M, or it can route rail traffic to Burlington, Vermont for interchange with the CN system, or it can route rail traffic to White Hall for interchange with D&H, which is being operated today by the Delaware Otsego system. In addition, Windsor Minerals has the option of trucking or combining a truck move with a bulk loading facility at any number of loading facilities. It is our understanding that in 1987 Windsor Minerals used all of the alternatives available to them, and shipped approximately 70% of its outbound loads by truck.

Thus, Windsor Minerals has available to it a range of competitive alternatives. One reason the Guilford system is aggressively seeking to improve productivity on its system is to enable it to improve its ability to attract additional Windsor Minerals traffic to the Guilford rail system.

PUBLIC POLICY AND THE EXEMPTION REQUEST

The purpose of an exemption is to remove regulation in certain situations if the Commission determines that the market is sufficient to provide competitive options to affect customers. In the past, exemptions have been granted for line sales but, to the best of our knowledge, only in situations where both parties are willing to participate in a sale. Frequently, the Commission has permitted such sales because of the recognition that such actions were essential for the preservation of service over certain lines and where the exemption would frequently permit a lower cost carrier to operate a line where previously a traditional Class I

carrier with its associated higher costs could not remain in business and meet its costs.

In the case of the Connecticut River Line, the Interstate Commerce Commission is being asked to effectively remove a regional carrier which, with the exception of the Connecticut River Line, has significantly changed its cost structure to a level that is similar to the many new regionals. The traffic on the Connecticut River Line is light density traffic even when one considers all of the business which presently moves over the Line. The Commission should determine how a traditional Class I mega carrier like CN, with all of its higher costs, can expect to expand and compete on the Line with its existing business. We believe that CN can only do so if it is successful in removing Guilford from the market. Such issues must be fully explored before any authorizations to proceed are issued.

The request for the exemption requires a review of the public policy related to the granting of exemption. An exemption should be granted only if it is determined that regulation is being removed and competition fostered. In the case of the proposed Connecticut River Line transaction, the Commission is not being asked to remove existing regulation; rather, it is being requested to add regulation. The Commission is being asked to bless a series of agreements which would provide additional restrictions on the Guilford system and would effectively remove the carrier as a competitor in a number of markets because of the enormous financial resources and market power of the CN system. With the elimination of D&H as a partner in the Guilford system, approval of the exemption would grant the CN system with the power to seriously affect the ability of other parts of the Guilford system to exist. By controlling the Connecticut River Line, CN will control Guilford's service route to CN and CP. CN would have the ability to effectively remove revenue producing traffic from Guilford's main line in Massachusetts.

Granting of the exemption, even if D&H had continued to be part of the Guilford system, would not have promoted competition in New England. Granting it today with the very existence of D&H in doubt would provide the CN system with the ability to effectively control a segment of Guilford's traffic and thus reduce the effectiveness of the Guilford railroads as a competitor in the entire New England market.

VERIFICATION

COMMONWEALTH OF MASSACHUSETTS :
: ss
COUNTY OF MIDDLESEX :

F. Colin Pease, being duly sworn according to law, deposes and says that he has read the foregoing Verified Statement, that he is familiar with the contents thereof and that the statements therein are true and correct to the best of his knowledge, information and belief.

[Signature]
F. Colin Pease

Sworn to and subscribed
before me this 19th day
of July, 1988

[Signature]
Notary Public

Nos. 90-1419, 90-1769

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.

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QUESTIONS PRESENTED

Upon review of a final decision of the Interstate Commerce Commission granting the application of petitioner National Railroad Passenger Corporation ("Amtrak") for a conveyance of rail property under Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. § 562(d), the court of appeals rejected the Commission's interpretation of Section 402(d), substituted its own interpretation, and vacated the Commission's order. While petitions for rehearing were pending, Congress enacted an amendment, specifically applicable to pending cases, to correct the erroneous reading of the statute by the court. However, the court of appeals denied rehearing, declaring that its interpretation was not affected by the amendment.

The questions presented are:

1. Did the court of appeals violate the principles of judicial review established in this Court's *Chevron* decision when it substituted its interpretation of Section 402(d) for the interpretation adopted by the Commission?
2. Did the court of appeals improperly disregard the clear will of Congress when it declared that its interpretation of Section 402(d) was not affected by the amendment to the statute?
3. Should the Commission's orders directing conveyance of a segment of the Connecticut River Line to Amtrak upon payment of just compensation and authorizing reconveyance thereof to the Central Vermont Railway have been upheld by the court of appeals?

PARTIES TO THE PROCEEDING

Petitioners are the National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont"). Respondent is the Boston and Maine Corporation ("B&M").*

In addition to the Interstate Commerce Commission and the United States of America, the petitioners in No. 90-1769, with which this case has been consolidated, the parties which participated in the proceedings before the court below and are not listed in the caption of the case in this Court are the following:

1. Windsor Minerals, Inc.
2. The State of Vermont
3. The Commonwealth of Massachusetts
4. Canadian Pacific, Ltd.
5. The Railway Labor Executives' Association

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* A description of the legal nature and corporate affiliations of petitioners and respondent, pursuant to Rule 29.1 of this Court's Rules, was provided in the Petition for Writ of *Certiorari* filed in this proceeding by Amtrak and Central Vermont. *See id.* at ii n.*.

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IN THE

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OCTOBER TERM, 1991

Nos. 90-1419, 90-1769

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
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Respondents.

INTERSTATE COMMERCE COMMISSION, *et al.*,
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BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The District Of Columbia Circuit

BRIEF OF PETITIONERS
NATIONAL RAILROAD PASSENGER CORPORATION and
CENTRAL VERMONT RAILWAY, INC..

OPINIONS BELOW

The decision of the court of appeals is reported at 911 F.2d 743 and reproduced at Pet. App. 5a-27a.[1] The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc* is reported at 925 F.2d 427 (Pet. App. 1a-4a). The unreported order of the court of appeals entered on February 25, 1991, granting motions to stay the issuance of its mandate, is reproduced at Pet. App. 28a. The final decision of the Interstate Commerce Commission, served August 9, 1988, is reported at 4 I.C.C.2d 761 (Pet. App. 29a-109a). The Interstate Commerce Commission's unreported interim decisions served July 5, 1988, May 25, 1988, and April 29, 1988, are reproduced at Pet. App. 110a-112a, 113a-118a and 119a-135a, respectively.

JURISDICTION

The judgment of the court below was entered on August 10, 1990. Timely petitions for rehearing were denied on February 1, 1991. The petition of Amtrak and Central Vermont for a writ of *certiorari* was filed on March 11, 1991 and was granted on October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 102 (as amended), 305(d), and 402 of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. §§ 501a, 545(d) and 562 (1988), and a 1990 amendment to Section 402(d)(1) of the RPSA, The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990), are reprinted in the Appendix to this Brief ("Br. App.") at 1a-12a.

[1] "Pet. App." refers to the appendix to the petition in No. 90-1419.

STATEMENT

This case concerns the scope of the right of the National Railroad Passenger Corporation ("Amtrak"), under Section 402(d) of the RPSA, to obtain from the Interstate Commerce Commission ("ICC" or "the Commission") an order requiring the conveyance of property of another railroad (in this case, a line of track) needed for Amtrak's federally-assisted intercity rail passenger service. The Commission ordered the conveyance, but the court of appeals, expressly disagreeing with the Commission's interpretation of a statute it administers, set aside the order. Congress then enacted an amendment embracing the Commission's interpretation, but although the amendment was specifically made applicable to pending cases and was clearly intended to apply to *this* case, the court of appeals determined on rehearing not to give it effect.

A. Background

Congress enacted the RPSA in 1970, creating Amtrak for the purpose of providing modern, efficient, cost-effective intercity rail passenger service on a nationwide basis. *See* 45 U.S.C. §§ 501, 501a (1988). Although Amtrak is not an agency or instrumentality of the United States (*see* 45 U.S.C. § 541 (1988)), Congress supports it with both capital grants and annual operating subsidies. *See generally* 45 U.S.C. § 601 (1988 & U.S.C.S. Supp. 1991). Congress amended the RPSA in 1973 to add Section 402(d), authorizing Amtrak to apply to the Commission for

an order requiring another railroad to convey to Amtrak, "on reasonable terms and conditions, including just compensation," property owned by that railroad that is required for Amtrak's intercity passenger service.

In a Section 402(d) application filed on April 4, 1988, Amtrak sought to require Boston and Maine Corporation ("B&M") to convey to Amtrak a fee interest owned by B&M in a 48.8-mile segment between Brattleboro, Vermont and Windsor, Vermont (the "B&M segment") of a rail line along the Connecticut River ("the Connecticut River Line" or "the Line"). In a petition filed with the Commission on April 7, 1988, Central Vermont Railway, Inc. ("Central Vermont") sought Commission approval for the reconveyance of this fee interest from Amtrak to Central Vermont, which would then assume ownership, grant trackage rights to B&M, rehabilitate the B&M segment, and ensure proper maintenance of the segment so that it could carry Amtrak's passenger trains. The Commission approved Amtrak's application and the reconveyance of the fee interest to Central Vermont in a Final Decision dated August 4, 1988 and served August 9, 1988. Pet. App. 29a-109a.

The court below set aside the Commission's order: rejecting the Commission's interpretation of Section 402(d), the court held that Amtrak may not use Section 402(d) to obtain a fee interest in rail property where it does not need to keep the fee interest but intends instead to convey it to another railroad. While petitions for rehearing were pending, Congress amended Section 402(d) to make it clear that Amtrak may reconvey property acquired under the statute as long as the Commission finds that the reconveyance

furthers the purposes of the RPSA. Br. App. 12a. The court below nevertheless denied rehearing, declining to give effect to the amendment in connection with the very transaction it was enacted to vindicate. Pet. App. 1a-4a.

1. Amtrak's "Montrealer" Operations

The Connecticut River Line, of which the 48.8-mile segment here at issue is a part, has historically provided main-line freight and passenger service through parts of Massachusetts, New Hampshire and Vermont. Portions of the Line are owned by B&M, and other portions are owned by Central Vermont. Both B&M and Central Vermont have operated on the Line, pursuant to reciprocal trackage rights agreements, for more than sixty years.[2] *See generally* Pet. App. 9a. From 1972 until April 1987, the Line served as part of the route for Amtrak's *Montrealer* passenger trains between Washington, D.C. and Montreal. *Id.*; *see also* J. Larson V.S., J. App. 34, 36-37.[3]

In 1977, Amtrak and B&M negotiated an Operating Agreement that governed the operation of the *Montrealer* on B&M's lines until the agreement was unilaterally terminated by B&M in 1987. J. Larson V.S., J. App. 37. B&M agreed to exercise its best efforts to maintain its rail lines, including the B&M segment,

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[2] "Trackage rights" are a lease arrangement whereby one railroad (the tenant) is allowed to operate its trains on tracks owned by another railroad (the landlord). *See generally Illinois Commerce Commission v. ICC*, 819 F.2d 311, 312 (D.C. Cir. 1987).

[3] This citation refers to the Verified Statement ("V.S.") of James L. Larson submitted in the proceedings before the ICC, which is reproduced in the parties' Joint Appendix ("J. App.") herein.

in such condition as to permit passenger trains to operate at "not less than" the speeds prescribed in the agreement, generally 50-55 m.p.h. *Id.*; Longhelt V.S., J. App. 68.[4] From 1977 to 1981, B&M maintained the Line sufficiently to allow generally satisfactory on-time performance by the *Montrealer*. J. Larson V.S., J. App. 38; Longhelt V.S., J. App. 69.

In 1983 and 1984, however, Guilford Transportation Industries, Inc. ("Guilford") acquired both the B&M and the Delaware & Hudson Railway ("D&H").[5] The D&H operated over a north-south line parallel to the Connecticut River Line. Because of its access to this alternate route, B&M's reliance on the Connecticut River Line as a freight route significantly decreased. J. Larson V.S., J. App. 38; Crampton V.S., J. App. 86-87. Indeed, on September 2, 1987, B&M amended its System Diagram Map (*see* 49 C.F.R. §§ 1152.10, 1152.11 (1990)) to include the Connecticut River Line in the category of track anticipated to be the subject of an abandonment or discontinuance petition within

[4] Federal Railroad Administration regulations prescribe the condition at which a given segment of track must be maintained to support freight and passenger operations at specified speeds. *See* 49 C.F.R. § 213.9 (1990). In specifying minimum passenger speeds of 55 m.p.h. over portions of the Line, the Amtrak-B&M Operating Agreement effectively required a level of maintenance under the F.R.A. system of track condition classification (F.R.A. Class 3) which would permit freight operations at 40 m.p.h.

[5] *See Guilford Transportation Industries, Inc.—Control—Boston & Maine Corp.*, 366 I.C.C. 292 (1982), *aff'd in part and remanded in part sub nom. Lamoille Valley R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transportation Industries, Inc.—Control—Delaware & Hudson Ry. Co.*, 366 I.C.C. 396 (1982), *aff'd in part and rev'd in part sub nom. Central Vermont Ry. Inc. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

the next three years. *See* Crampton V.S., J. App. 86-87; *see generally National Railroad Passenger Corp. v. Boston & Maine Corp.*, NAP Cases Nos. 72, 74, Opinion and Order at 11-12 (Nat'l Arb. Panel November 7, 1988) ("NAP Decision").[6]

Following Guilford's acquisition of the B&M, maintenance of the Connecticut River Line by B&M significantly decreased, with an adverse impact on freight and passenger service. From April 1986 through April 5, 1987, the date on which Amtrak discontinued *Montrealer* service, not one passenger train met its contractually agreed-upon schedule. J. Larson V.S., J. App. 38-40; Longhelt V.S., J. App. 69-70; NAP Decision at 8-9. The average time required to operate over the B&M segment during 1987 was approximately 67% higher than it had been in 1981. J. Larson V.S., J. App. 43.[7] Guilford officers and staff made

[6] On March 24, 1988, two days *after* Amtrak filed its Notice of Intention to File Section 402(d) Application with the ICC, B&M filed an amendment to its System Diagram Map, removing the Connecticut River Line from this category. *See* Pet. App. 122a n.2.

[7] When track conditions deteriorate, the railroad with responsibility for maintenance must place speed restrictions ("slow orders") over specific segments in order to insure safe operations. An Amtrak analysis, based on B&M records, of slow orders on the segment's 48.8 miles in October 1986 showed that speed restrictions had increased from *no* mileage restricted on January 21, 1985 to approximately 47 of the segment's 48.8 miles as of September 29, 1986. By April 1987, significant parts were restricted to speeds of 15 m.p.h. or less, including one mile limited to 5 m.p.h. J. Larson V.S., J. App. 42-43; Maas Reb. V.S., J. App. 116; *see* NAP Decision at 9. Track in such condition, of course, made successful provision of time-sensitive passenger service impossible and was also unacceptable in light of Con-

it clear in conversations with Amtrak during 1985 and 1986 that Guilford was rerouting freight traffic to the parallel D&H line and intended to make no significant expenditures for maintenance or upgrading projects on the Connecticut River Line. *Id.*, J. App. 39-40; Longhelt V.S., J. App. 69-70; *see also* NAP Decision at 13-14.

2. Steps Leading To Amtrak's Application To The ICC

Amtrak discontinued *Montrealer* service in April 1987 because of the deterioration of the Connecticut River Line. *See* Pet. App. 9a; *see also* J. Larson V.S., J. App. 32. Thereafter, Amtrak pursued two courses designed to restore the service. J. Larson V.S., J. App. at 46. The first was to ask an arbitration panel to order specific performance by B&M of its track maintenance obligations under the Operating Agreement.[8] Guilford's response was to terminate the agreement and refuse to arbitrate.[9] *Id.*, J. App. 46-47.

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gress' express directions to Amtrak concerning schedules and speeds. *See generally* 45 U.S.C. §§ 501a(6), (8).

[8] *National R.R. Passenger Corporation v. Boston & Maine Corp.*, N.A.P. Case No. 72 (filed April 24, 1987).

[9] *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, Civil Action No. 87-1507 (D.D.C. Sept. 1, 1987). The court of appeals held that the jurisdiction of the arbitration panel was for the panel, not the courts, to determine. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988). The arbitration panel subsequently held that it had jurisdiction and that B&M was in breach of its maintenance obligations under the Operating Agreement. It found that B&M had deliberately allowed the Line to deteriorate and had taken essentially no action to maintain it in light of its parent, Guilford's, determination to devote funds and energies to the maintenance of the parallel D&H line. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, N.A.P. Cases Nos. 72, 74, Opinion and Order at 8-14 (Nat'l Arb. Panel November 7, 1988).

Amtrak's other course was to seek a Congressional appropriation of funds for the rehabilitation of the Line, which Amtrak hoped would enable it to break the deadlock with Guilford and restore the *Montrealer* service. Congress did appropriate $5 million for upgrading the *Montrealer*'s route,[10] and Amtrak again sought to negotiate a compromise with Guilford under which the B&M segment would be rehabilitated and Guilford would thereafter maintain it at appropriate levels. *Id.*, J. App. 47. After one meeting in which Guilford indicated it was studying possible abandonment of the Line, Guilford terminated negotiations. *Id.*, J. App. 47-48; *see* Pet. App. 130a n.11.

Amtrak now faced a dilemma. Congress had appropriated $5 million for the specific purpose of rehabilitating the Connecticut River Line so that the *Montrealer* service could be resumed. In light of B&M's past performance, however, Amtrak could not responsibly spend funds on the rehabilitation of the B&M segment without a commitment to long-term maintenance that B&M was unwilling to provide. On the other hand, Amtrak did not have sufficient funds to allow it to purchase the Line, rehabilitate it, *and* finance its long-term maintenance. J. Larson Reb. V.S., J. App. 131-32.

In order to arrange for the rehabilitation and maintenance of the Line and thus make restoration of the *Montrealer* service possible, Amtrak entered into negotiations with Central Vermont, which owned the

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[10] Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-48 (July 11, 1987).

segments of the Line adjacent to both ends of the B&M segment and had reasons to maintain the track in good condition because, unlike B&M, it had no alternative route for its freight trains. *See* Maas Reb. V.S., J. App. 117-19. In March of 1988, Amtrak and Central Vermont agreed that (i) Amtrak would purchase the B&M segment or, if necessary, seek to condemn it under Section 402(d); (ii) Amtrak would then transfer title to the segment to Central Vermont at Amtrak's cost; (iii) Amtrak would pay Central Vermont up to $3.1 million of the appropriated funds to upgrade the Line to a condition suitable for Amtrak's high-speed passenger service; (iv) Central Vermont would fund the balance of the cost of rehabilitation and maintain the segment in good condition for a period of 20 years; and (v) Central Vermont would allow passenger service by Amtrak and grant trackage rights to B&M. *See* Pet. App. 114a. The State of Vermont entered into an agreement with Central Vermont pursuant to which the State provided in excess of $1.1 million in funding to assist in Central Vermont's purchase and rehabilitation of the B&M segment. *See* Vt. Acts. (1987 Adj. Sess.) No. 211, Sec. 5 (eff. May 26, 1988). Amtrak made an offer to purchase the B&M segment, which B&M declined. Pet. App. 11a, 130a-131a; *see* J. Larson V.S., Exs. 1-3, J. App. 55-62. Amtrak then filed an application with the Commission under Section 402(d), asking the Commission to order B&M to make the conveyance, and Central Vermont filed a petition seeking Commission approval of the reconveyance from Amtrak to Central Vermont.[11]

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[11] In view of the severe deterioration in the condition of the Connecticut River Line and the resulting adverse impact on

B. Proceedings Below

1. The Commission Decision

Section 402(d) is available only if Amtrak and the railroad that owns property Amtrak needs are "unable to agree upon terms for the sale to [Amtrak] of [the] property (including interests in property) . . . ." *See* 45 U.S.C. § 562(d)(1). Br. App. 8a-9a. B&M first sought a dismissal of Amtrak's Section 402(d) application, arguing that the application was defective as a matter of law because it did not establish that Amtrak and B&M were "unable to agree". In an interim decision dated April 26, 1988 and served April 29, 1988, the Commission rejected this argument:

> According to B&M . . . Amtrak . . . has not met the statutory precondition for filing an application under section 402(d) that requires that the parties be "unable to agree upon the terms of the sale." . . . We disagree. Amtrak has set forth a detailed history of its dealings and negotiations with B&M over the Conn River Line, and of its efforts to maintain passenger service over this line. Amtrak made a valid offer to purchase and, in response, B&M stated by letter dated March 29, 1988 that there was "no need to pursue the very complex offer to purchase" and instead proposed negotiations for compensation to B&M to rehabilitate and maintain its line

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passenger and freight rail service, each of the states most directly affected by the Amtrak-Central Vermont proposal—Vermont, Massachusetts and New Hampshire—intervened in the proceedings before the Commission in support of the proposed transactions.

> for Amtrak's passenger service. . . . Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under section 402(d).

Pet. App. 130a (footnotes omitted).

In a second preliminary ruling, dated May 19, 1988 and served on May 25, 1988, the Commission rejected a B&M request that the Commission convert Amtrak's Section 402(d) application into an application under Section 402(a) of the RPSA for the *use* of the B&M segment.[12] The Commission held that Amtrak had an "election of remedies"; as a result, Amtrak could determine that a mere right to use the track, with ownership remaining in B&M, would not meet its needs, and that the procedures available under Section 402(a) were therefore insufficient:

> Under Sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. . . . Here, Amtrak has made an election of remedies by filing its application under section 402(d) for conveyance of the subject line, and has done so deliberately. *Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt*

[12] Section 402(a), 45 U.S.C. § 562(a), provides that if Amtrak seeks the "use of tracks and other facilities" of a railroad and the parties are unable to agree, the Commission may order such use "on such terms and for such compensation as the Commission may fix as just and reasonable . . . ."

> *upgrading, permitting restoration of reliable and economical passenger service.* . . . As discussed in our April 29th decision, Amtrak has met the statutory criteria for the institution of a proceeding under Section 402(d). Thus, Amtrak is plainly entitled under the statute to a decision on the requested conveyance of the line.

Pet. App. 115a-116a (emphasis added). In a further interim decision dated July 1, 1988 and served July 5, 1988, the Commission stated that it anticipated granting the conveyance sought by Amtrak, and instructed the parties to submit their respective arguments and evidence regarding the just compensation issue. Pet. App. 110a.

In its Final Decision, the Commission applied the two statutory tests set forth in Sections 402(d)(1)(A) and (B).[13] The section provides that the Commission "shall order the conveyance of the property to [Amtrak]" unless the conveyance fails *both* tests. Subparagraph (B) asks whether Amtrak's passenger service obligations "can adequately be met by the acquisition of alternative property (including interests in property)[.]" The Commission considered and rejected each proposed alternative route for providing passenger train service to the areas of New England that the *Montrealer* had served. Pet. App. 46a. Sub-

[13] In its Final Decision, the Commission also reaffirmed the determinations made in its interim decisions served April 29, May 25, and July 5, 1988. *See* Pet. App. 40a, 42a. The Commission also declined B&M's invitation to find, based on various arguments, that Section 402(d), if interpreted to permit the Amtrak condemnation/reconveyance transaction, would be unconstitutional. Pet. App. 43a-45a.

paragraph (A) asks whether the conveyance would significantly impair the ability of the conveying railroad to carry out *its* obligations. Although not required to do so in light of its finding under subparagraph (B), the Commission also considered the subparagraph (A) question and found that in addition to receiving just compensation, "[B&M] has the option of retaining its local traffic [on the B&M segment] through a trackage rights agreement." Pet. App. 46a. The Commission agreed to establish the terms for B&M's trackage rights if the parties were unable to resolve them through negotiations. *See* Pet. App. 107a. It concluded that B&M's "ability to carry out its common carrier obligations . . . will not be impaired." Pet. App. 46a.

Since the Commission was required to order the conveyance unless it answered *both* statutory questions "yes", and since the Commission answered both questions "no", it concluded "that Amtrak has established its need under § 402(d) to warrant conveyance of the Connecticut River Line for the restoration of the Montrealer passenger service." *Id.* Accordingly, the Commission proceeded to address the appropriate valuation methodology for determining the just compensation due B&M for the taking, and awarded B&M $2,373,286. Pet. App. 46a-81a. B&M has since been paid that amount.[14]

In its Final Decision, the Commission also granted Central Vermont's petition for an exemption, pur-

[14] While several parties to the Commission proceedings—including the present petitioners—sought appellate review of the Commission's valuation analyses and conclusions, those issues were not reached by the court below and are not before this Court for review.

suant to 49 U.S.C. § 10505, from plenary Commission review, under 49 U.S.C. §§ 11343 *et seq.*, of its acquisition of the B&M segment from Amtrak.[15] The Commission found that: (1) B&M's acceptance of trackage rights would insure its continued ability to provide freight service on the Connecticut River Line; (2) Central Vermont's upgrading and maintenance of the B&M segment would enhance its own *and* B&M's ability to provide competitive service; (3) the exemption would enable Central Vermont to undertake rehabilitation of the segment on an expedited basis in furtherance of Congressional intent; and (4) the directly affected States all favored the transaction. The Commission therefore concluded that the exemption sought by Central Vermont should be granted. Pet. App. 84a-85a.[16]

[15] As explained by the Commission:

> [U]nder 49 U.S.C. § 10505, we must exempt a transaction . . . from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a; and (2) either (a) the transaction . . . is of limited scope, or (b) regulation is not necessary to protect shippers from abuse of market power.

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corp., ICC Finance Docket 31259, 4 I.C.C.2d at 798-99. Pet App. 82a.

[16] Chairman Gradison dissented, arguing that Section 402(d) does not authorize what she viewed as an "attempt by Amtrak to restructure [ownership of the fee] as between private, competing rail common carriers . . . ." *See* Pet. App. 96a-97a. The dissent also questioned the constitutionality of such an application of Section 402(d) in view of the "public use" requirement of the Fifth Amendment. *Id.* at 97a-105a.

The B&M segment was conveyed to Amtrak, upon its payment of just compensation to B&M, in September 1988, and Amtrak reconveyed the property to Central Vermont. The rehabilitation was performed, and Amtrak reinstituted *Montrealer* service in July 1989. Pet. App. 13a.

2. The Decision Of The Court Below

On B&M's petition for review, the court of appeals set aside the Commission's order directing the conveyance from B&M to Amtrak. Pet. App. 5a-27a. The panel majority held that Section 402(d) may not be used "to force the conveyance of property from one private owner to another . . . ." *Id.* at 7a. Noting that Amtrak could have obtained trackage rights on the B&M segment in a proceeding under Section 402(a), or condemned an easement under Section 402(d), and asserting that, since the fee interest was to be conveyed to Central Vermont, Amtrak must have had no need for that interest, the majority said, "[W]e conclude that [the RPSA] does not permit Amtrak to take property by eminent domain for which it concededly has no need itself . . . . " Pet. App. 15a.

The majority took note of the fact that the Commission had interpreted the statute to give Amtrak "a choice of remedies". *Id.* The majority also recognized that the Commission had concluded that, because of the need for continuous maintenance of the B&M segment, Amtrak needed to have the segment in the hands of a "responsible owner . . . that could be counted on to maintain the tracks in a condition suitable for the Montrealer." *Id.* at 20a.

But the majority said that under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), it was not obliged to defer to the ICC if it could determine "that Congress had an intention on the precise question at issue." Pet. App. 16a. It then proceeded to conclude that Congress' intention was "unambiguous", *id.* at 16a, and that it was "clear enough that the statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use," *id.* (emphasis in original), a test it said was not met here since Amtrak did not intend to keep the fee interest. The court also stated that an interpretation of the statute that would permit Amtrak to condemn one private railroad's property in contemplation of an immediate reconveyance to another would give rise to "at least colorable Fifth Amendment problems." Pet. App. 21a.[17]

Judge Ruth B. Ginsburg, concurring in the result, disagreed with the majority's interpretation of Section 402 and with its decision to "overrid[e] the agency" (Pet. App. 24a) on a question of statutory construction: "Nothing in the text of the RPSA, or in its legislative history, appears to me to force the conclusion . . . that because trackage rights are central to the challenged transaction, Amtrak had to resort to Section 402(a), or, alternatively, attempt to condemn a lesser property interest. . . ." Pet. App. 24a.[18]

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[17] The court also said, adopting B&M arguments that had not been made to the Commission, that its interpretation of Section 402(d) was dictated by a supposed congressional "policy against cross-subsidization, that is, against having one segment of the rail industry bear the expense of facilities and improvements of primary benefit to another." Pet. App. 22a.

[18] Judge Ginsburg concluded that a need for transfer to a new owner in order to assure adequate maintenance could justify invocation of Section 402(d) but that, while Amtrak had asserted

3. The Amendment Of The Statute And The Denial Of Rehearing

While petitions for rehearing were pending, Congress *did* clearly express its "intention on the precise question at issue," and its intention was precisely the opposite of the one attributed to it by the court of appeals. Congress amended Section 402(d)(1) to add the following sentence at the end:

> [Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of [the RPSA].

Independent Safety Board Act Amendments of 1990, Pub. L. 101-641, § 9(a), 104 Stat. 4654, 4658 (November 28, 1990). Br. App. 12a. The amendment was explicitly made applicable to pending cases. *Id.*, § 9(b).

Notwithstanding this clarification, the court below denied rehearing. The court acknowledged that Congress intended that the amendment be applied in the instant case. Pet. App. 3a. The court nevertheless refused to apply the amendment because, according to the court, it "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' " *Id.* The court also concluded that the Second Circuit's contrasting

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invocation of Section 402(d) but that, while Amtrak had asserted such a need, the Commission had not, in her view, made adequate findings on the point. She therefore concurred in the remand to the Commission. Pet. App. 25a-27a. *But see* n.20, *infra* at 30.

decision in *National Railroad Passenger Corp v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), was distinguishable. Pet. App. 2a. Judge Ginsburg reiterated her disagreement with the majority's reading of Section 402(d), noting that the amendment "coincides with my view that the [Commission] plausibly interpreted section 402." Pet. App. 4a.

SUMMARY OF ARGUMENT

The Commission interpreted Section 402 of the RPSA as giving Amtrak an "election of remedies". Pet. App. 39a. The subsection (d) procedure is available whenever (1) a line of track or other property owned by a railroad is "required for [Amtrak's] intercity passenger service" and (2) Amtrak and the railroad are "unable to agree" on terms of sale. With respect to the first condition, where property is sought for intercity passenger use, the statute says that Amtrak's need for the property "*shall* be deemed to be established" and the Commission "*shall* order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation" (emphasis added), unless the Commission finds *both* that the conveyance would significantly impair the conveying railroad's provision of freight service *and* that "adequate[]" alternative property to meet Amtrak's needs is available in specified ways not pertinent here. Amtrak's right to an order of conveyance is not conditioned on the unavailability of any other remedy. To the contrary, the choice between a subsection (d) condemnation and other remedies is, as the Commission recognized, Amtrak's: "Amtrak is empowered to seek different types

of relief depending on the type of service problems it encounters with other railroads." Pet. App. 39a.

Congress deliberately gave Amtrak the swift and sure remedy of condemnation because it recognized that Amtrak's "relatively inflexible" requirements for specific lines of track and other properties would often place Amtrak in "disadvantageous bargaining position[s]" when seeking property "necessary to perform its public service mission" and because it wanted Amtrak, whose operating losses are federally funded, to be able to use "the most economical means by which Amtrak could fulfill its requirements for a facility." S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973). The certainty that Amtrak can acquire property by eminent domain, and that its attempt to do so will not be frustrated by prolonged and risky litigation about whether threshold conditions have been met, facilitates negotiations between Amtrak and freight railroads, generally enabling Amtrak to meet its operating needs through negotiation without resort to the subsection (d) remedy. And where Section 402(d) must be invoked, the requirement of an expedited proceeding (*see* Section 402(d)(2)), in which the opportunity to block the conveyance is narrow, means that Amtrak can quickly upgrade track and provide (or resume) passenger train service.

The court of appeals expressly rejected the Commission's reading of Section 402(d). The majority found that Congress had an "unambiguous" (Pet. App. 16a, 23a) intention to permit Amtrak to condemn only those interests in property that it needs to own. It suggested that if Amtrak needs only the "*use*" of property (*id.* at 22a (emphasis in original)), Amtrak

is required to proceed under Section 402(a). And it rejected (Pet. App. 20a) the Commission's view that Amtrak could condemn a segment of rail line and transfer it to a responsible railroad in order to assure that the segment would be satisfactorily maintained and kept available for Amtrak's use. All of this was erroneous for three different reasons.

First, even before the 1990 amendment of Section 402(d), the text and legislative history of Section 402(d) and the structure and purpose of Section 402 as a whole clearly supported the Commission's interpretation, not the reading substituted by the panel majority. The text contained no hint that Amtrak must pursue any other statutory remedy in preference to invoking Section 402(d), or that the Commission should second-guess Amtrak's assessment of its needs or limit each conveyance to the minimum interest the Commission might think Amtrak needed, or that Amtrak was required to retain any interest conveyed to it. To the contrary, the text told the Commission that it "shall" order the conveyance applied for unless a narrow exception applies, and the text, the legislative history, and the overall structure of Section 402 all reflect an intention to help, not hinder, Amtrak in making economical arrangements for the facilities it needs.

Second, even if the traditional tools of statutory interpretation had offered some support for the panel majority's reading, the majority could not simply "impose its own construction on the statute" (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)), in place of the interpretation made by the responsible agency. Under *Chevron*, a reviewing court may displace an otherwise

permissible agency interpretation only if it finds that "Congress has directly spoken to the precise question at issue" (*id.* at 842). Here, the majority found that the intention of Congress was "unambiguous[ly]" contrary to the Commission's interpretation, without any supporting textual or historical evidence on the "precise question at issue" and in the face of the third panel member's view that the majority's reading was altogether wrong. This was an obvious evasion of *Chevron*.

Third, in any event, Congress then *did* speak to the precise question at issue, and it confirmed the Commission's interpretation. In a 1990 amendment intended to reverse the panel's result in this case, Congress provided that Amtrak "may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." *See* Br. App. 12a. On petitions for rehearing, however, the majority said that the 1990 amendment did not alter its conclusion that a planned reconveyance would invalidate a Section 402(d) conveyance "in the first place" (Pet. App. 3a); the amendment, the majority said, merely confirmed that Amtrak could make a "*subsequent*" (*id.*)—*i.e.*, not previously planned—reconveyance of property it had obtained under Section 402(d). With all respect, this interpretation of the amendment ignores its provenance and its clear purpose, reduces it to a wholly unnecessary restatement that Amtrak has the right to convey what it owns, and is plainly wrong.

The court of appeals also suggested that the Commission's interpretation of Section 402(d) gave rise to "colorable" questions under the "public use" requirement of the Fifth Amendment Takings Clause, Pet. App. 21a, and would violate a supposed policy against "cross-subsidization". *Id.* at 22a. But there is no question that the objective of making suitable arrangements for the rehabilitation, subsequent maintenance, and continued availability of a rail line for passenger transportation is a "public use" objective. *Cf. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). And apart from the fact that there is no policy against cross-subsidization in any pertinent provision of the RPSA, there is no cross-subsidization of any kind here: B&M was awarded "just compensation" for its property (as well as trackage rights over a line it had recently planned to abandon), and Central Vermont entered wholly voluntarily into a transaction acceptable to it.

Finally, the panel majority suggested (Pet. App. 18a-20a) that respondent B&M had made the two showings necessary to permit the Commission to decline to order the conveyance, but both halves of this suggestion rest on misreadings of the statute. The "adequate alternative property" referred to in Section 402(d)(1)(B) must be either rail property "available for sale on reasonable terms" or *non-rail* property subject to condemnation under 45 U.S.C. § 545(d). No alternative of either kind was available here; the "lesser interest" in the B&M segment suggested by the court was neither "available for sale on reasonable terms" nor subject to condemnation under 45 U.S.C. § 545(d). The majority also suggested (Pet. App. 19a) that the "significant impairment" test of Section 402(d)(1)(A) should be applied by considering the conveyance alone, without regard to the trackage rights that the Commission (not, as the majority

states, Central Vermont) afforded to B&M. But the Commission's view (Pet. App. 46a) that the impact on B&M should be measured in light of the transaction as a whole was clearly correct: Section 402(d) instructs the Commission to order a conveyance "on reasonable terms and conditions"; there is no reason why, in testing the effect of the conveyance, the Commission should be required to ignore the conditions it is, in fact, imposing.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION PROPERLY INTERPRETED SECTION 402(d) OF THE RAIL PASSENGER SERVICE ACT TO PERMIT AMTRAK'S CONDEMNATION OF THE B&M SEGMENT

The Commission interpreted Section 402(d) to allow Amtrak to seek the conveyance of a fee interest in a rail line required for intercity passenger service, even if Amtrak plans to keep only the right to use the line and intends to convey the fee interest (in a transaction separately subject to ICC review) to another railroad that undertakes to rehabilitate the line with Amtrak's funds and maintain it at a level adequate for passenger service. The court of appeals rejected this interpretation on the ground that Congress had an "unambiguous" intention to permit condemnation only of the specific interest in property that Amtrak intends to keep and own itself. Pet. App. 20a. The Commission's interpretation, we submit, was correct, was in any event entitled to deference under *Chevron*, and was clearly vindicated by the 1990 Amendment.

A. Even Before The 1990 Amendment, The Language, Legislative History, Structure And Purpose Of The RPSA All Supported The Commission's Interpretation

The court of appeals, purporting to examine "the language and history of subsection (d) and the structure of Section 402," Pet. App. 16a, concluded that the statute "unambiguous[ly]" bars the conveyance of a fee interest in rail property under Section 402(d) where a "lesser interest" obtainable pursuant to Section 402(a) or Section 402(d) might suffice, and bars the conveyance under Section 402(d) of interests Amtrak does not intend to keep. Pet. App. 17a-18a. The Commission had found no such limitation but had read the statute, sensibly, to allow Amtrak to apply for conveyance of the fee interest as part of an arrangement to assure the availability of an adequately maintained line. The Commission was plainly correct.

1. The Language Of Section 402(d)

As this Court has repeatedly stated, "[i]nterpretation of a statute must begin with the statute's language." *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989) (citations omitted). At the time of the Commission's decision (*i.e.*, prior to the 1990 Amendment), Section 402(d) provided, in pertinent part, as follows:

> (1) If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the Commission for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on

reasonable terms and conditions, including just compensation. Unless the Commission finds that—

> (A) conveyance of the property to [Amtrak] would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of [Amtrak] to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak], or available to [Amtrak] by the exercise of its authority under section 545(d) of this title,

the need of [Amtrak] for the property shall be deemed to be established and the Commission shall order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation.

45 U.S.C. § 562(d)(1). Br. App. 8a-9a.

Four points are noteworthy about this language. First, Congress clearly wanted the Commission to accommodate Amtrak's needs, not to impose obstacles. The section imposes only two requirements, first that Amtrak and the railroad be "unable to agree" on terms of sale and second that Amtrak have a "need" for the property at issue. With respect to the second requirement, the statute says the need "shall be deemed to be established" and the Commission "shall" order the conveyance unless it finds *both* that the conveyance would significantly impair the operations of the conveying railroad *and* that Amtrak's needs can be met by acquiring alternative property. To say

the least, this language does not suggest that the section should be read in a cramped fashion, so as to make Amtrak's use of the eminent domain power difficult and uncertain.

To the contrary, the language reflects Congress' recognition of Amtrak's need for a swift and sure means of obtaining the properties over which it provides service. Congress gave Amtrak the power of eminent domain so that it could avoid "disadvantageous bargaining position[s]" when seeking property "necessary to perform its public service mission." *See* pp. 32-33, *infra*. Uncertainty about the availability of the remedy would hamper the Amtrak-railroad negotiations that up to now have made resort to Section 402(d) virtually unnecessary. And litigation before the Commission and a reviewing court over the precise extent of Amtrak's needs would delay the provision (or, as here, resumption) of service, perhaps for years. Congress therefore deliberately instructed the Commission that it could deny an Amtrak application only in narrowly defined circumstances.

Second, there is no textual basis for the court of appeals' notion that Amtrak may not proceed under Section 402(d) unless trackage rights obtainable under Section 402(a) have been shown to be insufficient. Although enacted after Section 402(a), Section 402(d) does not refer at all to Section 402(a) or suggest any such limitation. As the Commission recognized,

> [u]nder Sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. In each case, relief may be granted

> only upon application by Amtrak, and in each case different criteria, procedures, and standards apply. *See* 45 U.S.C. 562(a)-(d).

Pet. App. 115a-116a. This analysis is clearly correct. Section 402(d) contains no language, plain or otherwise, limiting Amtrak's exercise of its condemnation power to only those situations where its need for rail property in furtherance of its provision of rail passenger service cannot be satisfied by trackage rights obtainable pursuant to Section 402(a).

Third, there is also no textual support for the court of appeals' conclusion (*see* Pet. App. 19a-20a) that the Commission should second-guess Amtrak's assessment of its needs and allow conveyance only of the *minimum* property interest the Commission concludes will meet Amtrak's needs. To the contrary, the statute leaves it to Amtrak to attempt to reach agreement on terms for the sale of whatever interests in a rail line *it* thinks it needs and, failing such an agreement, to apply to the Commission for an order requiring the conveyance of that interest. The Commission is instructed to issue the order unless it finds *both* "significant" impairment *and* the availability for sale on reasonable terms of suitable alternative rail property or alternative non-rail property which may be condemned. Nothing in the text suggests that the Commission has any general power to second-guess Amtrak's views as to the extent of its needs.

Before the Commission, B&M argued "that Amtrak could achieve its purposes under § 402(d) by acquiring an easement or trackage rights for passenger service without divesting B&M of ownership," but the Commission properly rejected this argument. Pet. App. 42a-43a. Section 402(d), which speaks of "property

(including interests in property)", clearly *permits* Amtrak to seek conveyance of an easement if Amtrak determines that that interest will best meet its needs and is unable to reach agreement with the owner. But nothing in the plain language of the statute *requires* Amtrak to condemn such a "lesser interest" if it believes it needs the fee interest. Contrary to the court's suggestion, the Commission did not "read[] the words 'interest in property' out of the statute" (Pet. App. 20a) but, rather, merely refused to read *into* the statute limitations or requirements that do not appear there.[19]

Finally, even before the 1990 Amendment, the language of Section 402(d) offered no support for the proposition (Pet. App. 15a) that Amtrak could seek conveyance only of interests in property it intended to retain. The majority purported to find such support in the words "required for intercity rail passenger service." But those words mean only that Amtrak must intend to use the rail line or other property at issue in its operations, as Amtrak indisputably in-

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[19] Petitioners wholly disagree with the court's apparent supposition that the acquisition of trackage rights or an easement in the B&M segment would have been sufficient to meet Amtrak's needs. Amtrak had once *had* trackage rights over the segment pursuant to its Operating Agreement with B&M. As the arbitration panel ultimately held, B&M breached that agreement by failing to maintain the Line in a condition satisfactory for running high-speed passenger trains; B&M indicated that it had no intention to resume proper maintenance, and even designated the Line for abandonment. *See* NAP Decision at 8-14. In these circumstances, the court's reading of Section 402(d) to require Amtrak to resume a dependency relationship with B&M is not only a misconstruction of the plain language of the statute but also defies actual past experience.

tended to use the B&M segment here; they say nothing about retention of interests. Since Amtrak plainly "required" the B&M segment to operate the *Montrealer* and was unable to agree with B&M on terms of purchase, Amtrak was authorized by Section 402(d) to apply to the Commission for an order of conveyance, as one part of a plan to have a rehabilitated and maintained B&M segment available for its use. The Commission properly accepted Amtrak's position on this point:

> Amtrak reiterates that it will be providing more than $3 million in funds which have been appropriated specifically for its benefit by Congress. Amtrak states that in exchange for this investment, it will obtain rehabilitation of the rail line, a guaranteed 20 years of proper maintenance on the rail line, and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level.

Pet. App. 41a-42a (footnote omitted). Crediting these statements of Amtrak, the Commission "conclude[d] that Amtrak has demonstrated that it has not abused the process available under § 402(d) by means of its dealings with [Central Vermont]." *Id.*[20]

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[20] Judge Ginsburg's opinion concurring in the result and her separate statement regarding the petitions for rehearing suggest that Section 402(d) requires the Commission to make a threshold finding, separate and apart from the factual inquiries required by subparagraphs (d)(1)(A) and (d)(1)(B) of the statute, that property designated for condemnation by Amtrak is "required for intercity rail passenger service." *See* Pet. App. 4a, 25a-26a. As shown by the foregoing analysis, however, Judge Ginsburg's reading of the statute is flawed; it is only necessary for the Commission to determine that Amtrak intends to use the rail line or other tangible property at issue in connection with its intercity rail passenger operations in order for the Commission's processes to be invoked, and the findings the Commission then makes under Sections 402(d)(1)(A) and (d)(1)(B) determine Amtrak's right to the conveyance, subject, of course, to payment of just compensation and such other reasonable terms and conditions as the Commission prescribes.

2. The Legislative History Of Section 402(d)

The Commission had no occasion to refer to the legislative history of Section 402(d) in its Final Decision. The court of appeals, however, purported to find support in the legislative history for the interpretation of Section 402(d) with which it supplanted the Commission's reading of the statute. In fact, the legislative history confirms the correctness of the Commission's interpretation.

Three years after the enactment of the RPSA, the Act was amended by the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, which, *inter alia*, added subsection (d) to Section 402. Section 402(d) originally provided that Amtrak could apply to the Commission for conveyance of railroad property "required for the construction of tracks and other facilities necessary to provide intercity rail passenger service[.]" Pub. L. No. 93-146, § 10, 87 Stat. at 552; *see also* Pet. App. 132a. Then, in 1976, Section 402(d) was given its pre-1990 language by Section 706(h) of the Railroad Revitalization and Regulatory Reform Act ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31, 125, which amended Section 402(d) to specify that Amtrak may condemn railroad property under that provision "without regard to whether or not construc-

tion of new tracks and facilities is involved." *Id.*; *see* S. Rep. No. 499, 94th Cong., 1st Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 119-20.[21]

The Senate Report on the Amtrak Improvement Act of 1973 illuminates Congress' intent in "giving [Amtrak] the power of eminent domain": the Report states, in pertinent part:

> At the present time [Amtrak] leases terminal and other facilities from various railroads. *These facilities are not always best adapted to Amtrak's needs, nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility.* For instance, it might make more economic sense for [Amtrak] to build a new facility at a different location. This may prove impossible if the only suitable alternative property sites are owned by the railroad which is the lessor of the existing facility. Under these circumstances, there is little economic incentive for the railroad to make alternative property sites available to [Amtrak].

[21] The Amtrak Improvement Act also amended Section 305 of the RPSA, 45 U.S.C. § 545 (Br. App. 3a), by adding a subsection (d) to that provision which permitted Amtrak, in a federal court proceeding, to condemn *non-railroad* property for the construction of tracks and other facilities "necessary to provide intercity railroad passenger service." *See* Pub. L. No. 93-146, § 6, 87 Stat. at 550. Like Section 402(d), Section 305(d) was amended by the 4R Act in 1976 to eliminate the requirement that non-rail property sought to be condemned thereunder be "for construction of tracks and other facilities." *See* 90 Stat. at 125.

> The result may be that Amtrak cannot acquire property it needs at a reasonable price. Because of the relatively inflexible site requirements of property [Amtrak] would typically want to acquire, Amtrak could easily be put in a very disadvantageous bargaining position. It is precisely for this reason that railroads have generally been granted the power of eminent domain under State law. Giving [Amtrak] the power of eminent domain, coupled with the ability to seek conveyance of property through the Commission under this section, will insure that Amtrak can acquire the property necessary to perform its public service mission at a reasonable price.

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphasis added).

The court of appeals cited this legislative history, and quoted it in part (*see* Pet. App. 16a-17a), but the court ignored its plain meaning. The quoted passage acknowledges that a leasehold (*e.g.*, trackage rights obtained under Section 402(a)) "may not be the most economical means by which Amtrak could fulfill its requirements[.]" And the quoted passage makes it clear that Congress wanted to give Amtrak the power of eminent domain so that, "through the Commission" Amtrak could assess and accommodate its own needs in circumstances where its need for specific property leaves it with little bargaining power. The passage is in complete harmony with the Commission's conclusion that Amtrak has the statutory authority to "elect" to condemn a fee interest in another railroad's

track when it needs to use the track in connection with provision of passenger service, irrespective of whether trackage rights in that same line might be acquired under Section 402(a).

The passage does not, of course, refer to Amtrak's right to reconvey property acquired under Section 402(d). The legislative history of the pre-1990 Section 402(d) is silent as to any Congressional intent on that point. But there was no basis for the court of appeals' suggestion that the legislative history of Section 402(d) supported its conclusion that the Commission's reading of the statute had to be overturned.

3. The Structure Of Section 402 As A Whole

The court of appeals also said it had considered "the structure of Section 402" as a whole, Pet. App. 16a, and particularly "the interplay between subsections (a) and (d)" in construing the statute. *Id.* at 22a. But the interplay the court found is illusory: Section 402(d) was indeed adopted because Amtrak's other means of obtaining the use of tracks and other facilities might in various circumstances be inadequate or uneconomical, but neither the language nor the legislative history of Section 402(d) suggests in any way that a showing of inadequacy of other means is a prerequisite to invocation of Section 402(d). As the legislative history shows, the Commission ruled correctly that Section 402(d) contemplates a remedy for Amtrak which is separate, and was clearly intended by Congress to be distinct, from the pre-existing remedy available under Section 402(a).

The court of appeals also ruled that an interpretation of Section 402(d) that permitted Amtrak to condemn rail property in which it did not intend to retain an ownership interest would contradict a sup-

posed policy against "cross-subsidization". The court did not identify any applicable bar to cross-subsidization,[22] but in any event, there is no cross-subsidization here. B&M received "just compensation", determined by the Commission subject to judicial review, as well as trackage rights; Amtrak and the State of Vermont paid more than $4 million for rehabilitation of the B&M segment; and CV entered voluntarily into a transaction economically acceptable to it.[23] Neither B&M nor Central Vermont was "subsidizing" Amtrak in any way.

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[22] The court cited a case decided under the Interstate Commerce Act, 49 U.S.C. § § 10101a *et seq.*, without explaining its relevance to this case. *See General American Transp. Co. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990). Section 402(a)(2) of the RPSA contains a prohibition against cross-subsidization, but that provision is applicable only to Commission determinations made in the situation where *Amtrak* owns a rail line that is being used jointly with a freight railroad, and the Commission is required to determine the amount of compensation the freight railroad is required to pay Amtrak. That provision has no relevance here. The more general approach of the RPSA is reflected in Section 102 (as amended) of the RPSA, 45 U.S.C. § 501a(2), wherein Congress encourages "the private sector to share in the cost of operating rail passenger service. . . ." *See also* 45 U.S.C. § 501a(10).

[23] Central Vermont owned the segments of the Connecticut River Line adjacent to both ends of the B&M segment, and provided substantial freight service over the Line. The deterioration of the B&M segment had a significant detrimental impact on this freight service, and increased Central Vermont's operating expenses. Unlike B&M, Central Vermont had no parallel freight route to which it could carry traffic. Thus, Central Vermont had substantial business justifications to acquire, rehabilitate and maintain the B&M segment. The Commission expressly found that Central Vermont's acquisition would not adversely affect B&M's competitive interests. *See* Pet. App. 84a. In ad-

B. The Commission's Interpretation Of Section 402(d) Was Entitled to Deference Under *Chevron*

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated the principles governing judicial review of an agency's interpretation of a statute it administers. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). But if the Congressional intent is not clear and unambiguous, then "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* at 843. Rather, the reviewing court's function is to determine whether the agency's interpretation of the statute reflects a "permissible construction". If so, the reviewing court is bound by that reading, even if the court would have construed the statute differently "if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11, 844.

The majority below acknowledged *Chevron* (Pet. App. 16a) and then rejected the ICC's interpretation

dition, the uncontroverted factual evidence before the Commission indicates that Central Vermont maintains *all* of its main freight lines to the F.R.A. "Class 3" standard—*i.e.*, in a condition suitable for high-speed passenger trains. *See, e.g.*, Maas Reb. V.S., J. App. 118 ("Unlike B&M, CV does not regard Amtrak's maintenance requirements to be 'unique' or unjustified for freight operations. We maintain our entire main line at FRA Class [3], even in areas where Amtrak has never operated. . . ."); *see id.*, J. App. 125. The fact that Central Vermont's maintenance of the segment in a manner consistent with its own preexisting practices would also preserve the conditions required by Amtrak for its *Montrealer* service does not amount to a "cross-subsidy" of Amtrak.

on the ground that Congressional intent was "unambiguous[ly]" to the contrary. But as the preceding argument makes clear, the majority was simply making an end run around the principle of deference to agency interpretation, preferring its own reading of the statute to the ICC's and then labelling its reading "unambiguous". Nothing in the statute or its legislative history indicates, unambiguously or otherwise, that the Commission must second-guess Amtrak and hold Amtrak to the minimum interest it thinks will meet Amtrak's needs, or that it must refuse to convey any interest Amtrak does not intend to keep. The statute and the legislative history are silent on any such limits. To the extent that "Congress has directly spoken to the *precise* question at issue," *Chevron*, 467 U.S. at 842 (emphasis added), it has made it clear that Amtrak is to have what the Commission called an "election of remedies" (Pet. App. 116a) to obtain the interest in rail properties it determines it needs to provide intercity rail passenger service on an efficient, cost-effective basis, with a requirement of just compensation and the participation of the Commission to protect other parties.

Under *Chevron*, the court of appeals' sole function with respect to the interpretation of the statute was to determine whether the Commission's interpretation was "permissible". 467 U.S. at 843. In fact, the Commission applied Section 402(d) precisely as it is written. It made a threshold determination that Amtrak and B&M were "unable to agree" on terms for the voluntary sale of the Connecticut River Line, as the statute requires. It determined that Amtrak sufficiently articulated a "need" for the B&M segment—*i.e.*, that Amtrak needed to use the segment in its

provision of intercity rail passenger service—and it considered the evidence of record with regard to each of the two statutory conditions that would have to be met to overcome Amtrak's presumptive right to have the property conveyed. There is nothing remotely *impermissible* about the Commission's construction of the statute, and the court of appeals was obliged to defer to it.

C. Any Doubts As To The Correctness Of The Commission's Interpretation of Section 402(d) Were Definitively Resolved By the 1990 Amendment

After the initial decision below, Congress took prompt action. In the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654, Congress amended Section 402(d)(1) by adding the following sentence at the end of the existing text: "[Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of [the RPSA]." Pub. L. No. 101-641, § 9(a), 104 Stat. at 4658 (emphasis added). Br. App. 12a.

Congress made it clear that the amendment was to be applied to the present case, which was still before the court below on the petitions for rehearing filed by Amtrak and Central Vermont, the Commission, and others: "The amendment . . . shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment)." *Id.*, § 9(b) (emphasis added).

The legislative history of the 1990 Amendment makes it clear that (i) Congress wanted the amendment applied to this case, (ii) Congress believed the

court below had "misconstrued" the statute, (iii) Congress wanted to leave the structuring of the passenger rail system to Amtrak's "considered discretion," and (iv) Congress wanted it understood that Amtrak may exercise "its eminent domain authority" and then "convey interests in condemned property" in furtherance of its statutory purpose. The sponsor of the legislation, Senator Jeffords, spoke plainly:

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.
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> * * *
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purpose under the Rail Passenger Service Act, as it did in the Montrealer situation. This leaves the structuring of the nationwide rail passenger system to Amtrak's considered discretion, as the Rail Passenger Service Act intends.

See 136 Cong. Rec. S17668 (daily ed. October 27, 1990).

Where Congress alters an existing statute while a case involving interpretation of the statute is on appeal, the amendment is applicable to the pending case if Congress so intends. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990).

Here, there was no doubt that Congress intended that the amendment "shall apply" to pending cases.

The court of appeals nevertheless denied rehearing, ignoring not only Congress' evident desires with respect to the present case but also the plain meaning of the amendment. The court said:

> The new language plainly authorizes Amtrak to convey property *subsequent to* a condemnation that is otherwise valid under section 402(d)(1). *It does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not "required for intercity rail passenger service."* The court construed section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by [condemning] a lesser interest or by using its subsection (a) power.

Pet. App. 3a (emphasis in original and added). In other words, according to the court, a subsequent conveyance of a condemned property is permissible if, but only if, Amtrak was not planning the subsequent conveyance at the time of the condemnation, because any such plan would show a lack of "need" and invalidate the condemnation.

With all respect, the clear intention of the amendment was to validate condemnations where Amtrak *does* intend a prompt reconveyance. First, the statute was intended to correct the result in *this* case, in which a reconveyance was an explicit part of the plan.

However much the panel majority may have disliked being dictated to by Congress during the pendency of the case, the court had no right, in the course of interpreting the 1990 amendment, to disregard the circumstances that prompted Congress to adopt it. Second, the court of appeals' interpretation robs the amendment of virtually all of its meaning. If a conveyance to Amtrak under Section 402(d) is invalid "in the first place" to the extent that Amtrak plans to reconvey the property, then the amendment applies only where Amtrak has a post-condemnation change of circumstances or change of heart, and the amendment states only the obvious fact that Amtrak is not required to keep such property forever. Congress clearly did not intend such a wholly unnecessary declaration.[24] What it did intend was to confirm that Amtrak may indeed seek conveyance of interests in property that it does not intend to keep, and thereby correct the mistake made below when, in Senator Jefford's words, "the court misconstrued [Amtrak's] authority" in this very case.[25]

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[24] The Ifterstate Commerce Act already provides authority for railroads, including Amtrak, to transfer lawfully acquired rail property to other carriers, *see* 49 U.S.C. § 11343 (1988).

[25] The amendment provides that the Commission must find that the reconveyance furthers the purposes of the RPSA. The Commission had, of course, already so found here. See Pet. App. 44a-45a ("Amtrak has established that its interest in having the line conveyed is so that it may reinstitute its Montrealer passenger service—clearly a 'public purpose.'"). *See also* 136 Cong. Rec. S17668 (daily ed. October 27,1990) (statement of Sen. Jeffords) (Amtrak entitled to reconvey condemned property when reconveyance furthers purposes of the RPSA, "as it did in the Montrealer situation").

D. No Genuine Constitutional Question Is Presented By the Commission's Interpretation Of Section 402(d)

The court of appeals suggested that its rejection of the Commission's reading of Section 402(d) was required in order to avoid a constitutional question:

> Although we do not reach B&M's constitutional argument that the forced conveyance approved by the ICC violated the public use requirement of the Takings Clause, we note that there are at least colorable Fifth Amendment problems with the statute as interpreted by the Commission.

Pet. App. 21a.

But there is no serious "public use" question here. As the Commission recognized, the overall transaction served the "public purpose" of achieving "modern, cost-efficient, and energy-efficient intercity railroad passenger service," 45 U.S.C. § 501(a). See Pet. App. 44a-45a. The court below acknowledged (Pet. App. 21a) that this Court's decisions construing the words "public purpose" in the Fifth Amendment have validated takings for reconveyance to a private third party when they further a legislatively articulated public interest. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). That should have been the end of the matter. As this Court stated in *Midkiff*, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." 467 U.S. at 244.[26]

[26] In the analogous case of *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), the Second Circuit rejected a constitutional challenge to an Amtrak condemnation and reconveyance of property. In *Two Parcels*, Amtrak forcibly acquired a fee interest in non-rail property pursuant to Section 305(d) of the RPSA, 45 U.S.C. § 545(d), with the intention of reconveying the property to the City of New London, Connecticut, which would construct a service road on the property adjacent to Amtrak-owned rail lines and grant Amtrak a permanent easement thereon. Rejecting the condemnee's argument that Amtrak's exercise of its condemnation power was unconstitutional, the court stated that "New London's grant of a permanent easement to Amtrak for inspection/maintenance purposes, the exercise of which may periodically close the road to the public, demonstrates the significant relationship between the condemned property and the provision of intercity rail passenger service." 822 F.2d at 1265.

If the court below believed that there were "colorable Fifth Amendment problems" that need not be addressed absent a "clearer statement" of Congress' intent to allow Amtrak to reconvey condemned property to a third party, it apparently did not believe those problems to be substantial enough to merit discussion on rehearing after Congress provided such a statement with the 1990 amendment.[27] Clearly, the Fifth Amendment's "public purpose" requirement imposed no impediment to the transaction approved by the Commission.

[27] Judge Ginsburg, in her separate statement on rehearing, confirmed that she was without doubt as to the constitutionality of the statute: "Furthermore, current Supreme Court precedent, as I comprehend it, does not cast constitutional doubt on the legislature's measure." Pet. App. 4a (citation omitted).

II. THE INTERSTATE COMMERCE COMMISSION CORRECTLY DETERMINED THAT BOSTON & MAINE DID NOT MAKE EITHER OF THE TWO SHOWINGS IT HAD TO MAKE TO OVERCOME THE STATUTORY PRESUMPTION IN FAVOR OF THE CONVEYANCE TO AMTRAK

Section 402(d) provides that the Commission "shall order" the conveyance of property to Amtrak unless it finds *both* that the conveyance would "significantly impair" the ability of the conveyor railroad to carry out its obligations as a common carrier *and* that Amtrak's obligations "can adequately be met by the acquisition of alternative property (including interests in property)."[28] This is an extremely strong statutory command in Amtrak's favor: an objector must persuade the Commission on both points; each point contains an adverb ("significantly" impair; "adequately" be met) that inclines in favor of Amtrak and against the objector; even if the objector persuades the Commission on both points, this only removes the presumption in favor of the transaction; but if the objector fails on either point, the Commission is unequivocally compelled to order the conveyance.

---

[28] The Conference Report regarding the enactment of Section 402(d) explained:

> Amtrak's need for the property would be deemed to be established, and the Commission would be required to order the conveyance, unless it found that such conveyance would significantly impair the ability of the railroad to carry out its obligations as a common carrier and that Amtrak's obligations to provide rail passenger service could be met by the acquisition of alternative property[.]

Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2331, 2338.

In the present case, the Commission, based on the record, found against the objector (B&M) on both points. Pet. App. 45a-46a. The court of appeals rejected the Commission's findings on both issues, Pet. App. 18a-21a, but did so only in light of its erroneous view of what findings the statute actually requires.

A. The Commission Correctly Concluded That B&M Failed To Prove That Amtrak Had An Adequate Alternative

The Commission's Final Decision first discusses Section 402(d)(1)(B), which as applied to this case asks whether Amtrak's needs in relation to the resumption of *Montrealer* service could "adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak], or available to [Amtrak] by the exercise of its authority under [45 U.S.C. § 545(d)]." The Commission interpreted "alternative property" to mean property *in another location* and rejected the alternative routes that B&M suggested. Pet. App. 45a-46a. The court of appeals refused to accept this reading of the statute and, in a variation of its earlier theme, said that the Commission should have determined whether a lesser interest in *the B&M segment* would have met Amtrak's needs. Pet. App. 19a-20a.

There are two fundamental errors in the court's response. First, the court was once again improperly substituting its reading of the statute for the Commission's. The Commission reasonably interpreted the statute to refer to property in another location, to give Amtrak a choice of remedies, not to give the Commission the task of identifying the least interest in the B&M segment itself that Amtrak could get by with, and the Commission's interpretation was enti-

tled to deference. Second, subparagraph (B) speaks *only* of adequate alternative rail property "available for sale on reasonable terms" or *non-rail* property available by means of condemnation under a separate section, 45 U.S.C. § 545(d) (Br. App. 3a). There was no lesser interest in the B&M segment adequate for Amtrak's purposes and "available for sale on reasonable terms". No interest in the B&M segment was subject to condemnation under Section 545(d); nor was there any other alternative property meeting the requirements of subparagraph (B). Nothing in the provision suggests even that the Commission *may* (let alone that it must) consider the alternative of condemning a "lesser interest" in the *rail* property that comprised the B&M segment.

B. The Commission Also Correctly Concluded That B&M Failed To Prove That Its Service Would Be Significantly Impaired

Section 402(d)(1)(A) requires an objector to prove that a conveyance would "significantly impair the ability of the railroad to carry out its obligations as a common carrier." The Commission found that B&M had not satisfied this test either:

> B&M is receiving just compensation for the property being conveyed and has the option of retaining its local traffic through a trackage rights agreement. Its ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired.

Pet. App. 46a.

Again, the majority below expressed dissatisfaction with the Commission's findings on this issue, and again, its criticism of the Commission rests on a con-

ception of the statute that is both inconsistent with the deference due to the ICC and wrong. First, the majority asserts that the Commission was not entitled to dismiss B&M's "explicit claim of significant impairment" based on an assumption that B&M "will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont." Pet. App. 19a. But it was the *Commission*, not Central Vermont, that had the power to, and did, define the terms and conditions of B&M's trackage rights so as to protect B&M's interests. Pet. App. 107a; *see National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests In Connecticut River Line in Vermont and New Hampshire*, 7 I.C.C.2d 539 (1990).

The majority then states that the Commission's application of subparagraph (A) was erroneous because "the statute provides that the Commission's finding on impairment focus on the 'conveyance of the property to [Amtrak]' and not on *post hoc* remedies aimed at ameliorating the impairment[.]" Pet. App. 19a. This analysis is simply wrong. Neither the text, which instructs the Commission to order a conveyance to Amtrak "on reasonable terms and conditions," nor common sense suggests that the Commission must separate the conveyance from the conditions and determine whether the conveying railroad would be significantly affected by a hypothetical conveyance that was *not* subjected to the conditions the Commission is, in fact, imposing.

CONCLUSION

For all of the foregoing reasons, the decision of the court of appeals should be reversed and remanded with instructions to affirm the Commission's decision with regard to the conveyance issues.

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Dated: November 21, 1991

APPENDIX

45 U.S.C. § 501a. Goals

The Congress hereby establishes the following goals for Amtrak:

(1) Exercise of the Corporation's best business judgment in taking actions to minimize Federal subsidies, including increasing fares, increasing revenues from the carriage of mail and express, reducing losses on food service, improving its contracts with operating railroads, reducing management costs, and increasing employee productivity.

(2) Encouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies.

(3) Improvement of the number of passenger miles generated systemwide per dollar of Federal funding by at least 30 percent within the two-year period beginning on October 1, 1981.

(4) Elimination of the deficit associated with food and beverage services by September 30, 1982.

(5) Implementation of strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient service.

(6) Operation of Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables for such operations.

(7) Development of service on rail corridors, subsidized by States or private parties, or both.

(8) Implementation of schedules which provide a systemwide average speed of at least 60 miles per hour, and which can be adhered to with a degree of reliability and passenger comfort.

(9) Improvement of the feasibility of State-subsidized service through the use of technical assistance panels to coordinate, plan, and implement such service.

(10) Encouragement of rail carriers to assist in improving intercity rail passenger service.

(11) General improvement of Amtrak's performance through comprehensive, systematic operational programs and employee incentives.

(12) Implementation of policies ensuring equitable access to the Northeast Corridor by both intercity and commuter services.

(13) Coordination among the various uses of the Northeast Corridor, particularly intercity and commuter passenger services.

(14) Amtrak's maximization of the use of its resources, including the most cost-effective use of employees, facilities, and real estate. Amtrak is encouraged to enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies.

45 U.S.C. § 545. General powers

(d) Acquisition of property; declaration of taking; property compensation; procedures; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available—

> **(A)** to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct and intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and
>
> **(B)** to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required [for] intercity rail passenger service;

by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

> **(A)** a statement of the public use for which the property is taken;
>
> **(B)** a description of the property taken sufficient for the identification thereof;
>
> **(C)** a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such or-

ders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

45 U.S.C. § 562. Facilities and service agreements

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

(1) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed.

(2) Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other

railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-way, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 [45 U.S.C.A. § 701 et seq.] and the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.]. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 120 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall not permit cross subsidization between intercity rail passenger service and rail freight services. The Commission, in making such a determination, shall assign to a freight railroad obtaining services pursuant to this paragraph the costs incurred by the Corporation solely for the benefit of that railroad, plus a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of the Corporation and such freight railroad. The proportionate share of such other costs assigned to a freight railroad shall be based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of the rail properties covered by this paragraph. Nothing in this paragraph shall be construed to preclude parties from entering into an agreement under this paragraph either before or after a determination of the Commission under this paragraph.

(b) Immediate availability of tracks and other facilities

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Com-

mission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) Emergency measures

To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) Disagreement procedures

(1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and

(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title;

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) Preferences for intercity or commuter passenger trains

(1) Except in an emergency, intercity or commuter passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of Title 5, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) Accelerated speeds

If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit

such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

(g) Operation of additional trains

Upon receipt of an application from the Corporation in any situation where the Corporation is unable to obtain a satisfactory, voluntary agreement from a rail carrier for operation of additional trains on the rail lines of that rail carrier, the Secretary may, after a hearing on the record, order such rail carrier, within 60 days, to permit or provide requested operation of trains of the Corporation over such rail lines on schedules based upon legally permissible operating times. If the Secretary determines not to hold a hearing, the Secretary, within 30 days after receipt of an application from the Corporation, shall publish in the Federal Register his reasons for not holding a hearing. Any such hearing must include a consideration of whether such an order would unduly impair freight operations of the rail carrier involved, and the burden shall be on the rail carrier seeking to oppose the operation of an additional train to demonstrate that the requested operation will impair freight operations. In establishing such scheduled running times, the Secretary shall give proper consideration to the statutory goal that the Corporation shall implement schedules which will attain a system-wide average speed of at least 55 miles per hour which can be adhered to with a high degree of reliability and passenger comfort. The compensation payable by the Corporation to a rail carrier for an operation ordered pursuant to this subsection shall be that which is properly established pursuant to an agreement between the Corporation and such rail

carrier, or, in the absence of an applicable agreement, shall be determined by the Commission in a proceeding pursuant to subsection (a) of this section.

The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990)

Section 9(a). Section 402(d)(1) of Rail Passenger Service Act (45 U.S.C. § 562(d)(1)) is amended by adding at the end the following new sentence:

> "The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.".

(b) The amendment made by subsection (a) shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment).

Supreme Court, U.S.
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Nos. 90-1419 and 90-1769

In the Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL., PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Interstate Commerce Commission is not empowered by Section 402(d) of the Rail Passenger Service Act of 1970, 45 U.S.C. 562(d), to approve the condemnation by the National Railroad Passenger Corporation (Amtrak) of railroad track that Amtrak intends to reconvey to another railroad.

2. Whether the court of appeals erred, on rehearing, in persisting in that holding despite Congress's amendment of Section 402(d), in direct response to the court's initial decision, to clarify that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act" (Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4658).

3. Whether the Commission's allowance of Amtrak's condemnation and subsequent conveyance should have been upheld by the court of appeals in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1419

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL., PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

No. 90-1769

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-27a)[1] is reported at 911 F.2d 743. The order of the

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[1] References to "Pet. App." in this brief are to the appendix to the petition in No. 90-1419. The parties to the proceedings

court of appeals on the denial of rehearing (Pet. App. 1a-4a) is reported at 925 F.2d 427. The final decision of the Interstate Commerce Commission (Pet. App. 29a-109a) is reported at 4 I.C.C.2d 761. Interim decisions of the Commission served July 5, 1988, May 25, 1988, and April 29, 1988 (Pet. App. 110a-112a, 113a-118a, 119a-135a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. The petitions for rehearing were denied on February 1, 1991. Pet. App. 1a-4a. The petition for a writ of certiorari in No. 90-1419 was filed on March 11, 1991. On April 23, 1991, Chief Justice Rehnquist extended the time within which to petition for a writ of certiorari in No. 90-1769 to and including May 16, 1991, and the petition was filed on that date. The Court granted the petitions in No. 90-1419 and No. 90-1769 and consolidated them on October 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d), and Section 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, are set forth in the appendix to this brief (App., *infra*, 1a-3a).

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in the court of appeals, in addition to the Interstate Commerce Commission and the United States, were Boston and Maine Corporation, Canadian Pacific, Ltd., Central Vermont Railway, Inc., Commonwealth of Massachusetts, National Railroad Passenger Corporation, Railway Labor Executives Association, State of Vermont, and Windsor Minerals, Inc.

STATEMENT

A. The Statutory Scheme

The National Railroad Passenger Corporation (Amtrak) is a private, for-profit corporation created by Congress in order to revitalize and maintain intercity and commuter passenger train travel in the United States. 45 U.S.C. 541. See generally *National R.R. Passenger Corp.* v. *Atchison, T. & S. F. Ry.*, 470 U.S. 451, 453-455 (1985). In the statute that created Amtrak, the Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1328, Congress recognized that Amtrak would run its passenger trains primarily over existing and future track systems of freight railroads rather than constructing or purchasing its own track networks; accordingly, it authorized Amtrak, among other things, to enter into "trackage rights" agreements that give Amtrak the right to use the tracks of other railroads. 45 U.S.C. 562(a). Congress further provided that if Amtrak and the railroads cannot reach agreement on their own, Amtrak may request the Interstate Commerce Commission (ICC) to prescribe necessary trackage rights agreements. 45 U.S.C. 562(a).

Three years after enacting RPSA, Congress amended the statute with Section 402(d), empowering Amtrak to acquire railroad property by eminent domain. Finding that Amtrak's "inflexible site requirements" might reduce its bargaining leverage and expose it to unreasonable demands in acquiring property it needed from railroads, see S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), Congress gave Amtrak the right to condemn property of railroads that is "required for intercity rail passenger service" if Amtrak and the railroad cannot agree on terms of sale. 45 U.S.C. 562(d)(1). To condemn property under

Section 402(d), Amtrak must apply to the ICC for an order that establishes Amtrak's "need" for the property and requires its conveyance. 45 U.S.C. 562 (d)(1). Section 402(d) states that the "need" of Amtrak "shall be deemed to be established" unless the ICC finds that (A) conveyance to Amtrak "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* (B) Amtrak can fulfill its obligations by acquiring an alternative property interest that is "available for sale on reasonable terms," or is available through the exercise of Amtrak's power under a companion provision (45 U.S.C. 545(d)) that authorizes Amtrak to condemn non-rail private property. 45 U.S.C. 562 (d)(1).[2]

B. The ICC's Determinations

This case involves Amtrak's use of Section 402(d) to condemn a line of track belonging to the Boston and Maine Corporation (B&M) for the purpose of reconveying the track to Central Vermont Railway, Inc. (Central Vermont)—a transaction designed to restore passenger service on Amtrak's "Montrealer" train between Washington, D.C., and Montreal, Canada.

1. In 1972, Amtrak began providing Montrealer service. In crossing portions of New England, the Montrealer used the tracks of the Connecticut River Line (Conn River Line). B&M owned a 48.8 mile portion of that line running between Brattleboro, Vermont, and Windsor, Vermont. In 1977, Amtrak and B&M had entered into a trackage rights agreement covering this stretch. Over time, however, B&M

[2] Congress amended 45 U.S.C. 562(d) following the panel's rejection of the ICC's decision in this case; the amendment is discussed at pp. 10-11, *infra*.

failed to maintain the tracks in a suitable condition to permit Amtrak to provide the high-speed service needed for Amtrak's trains.[3] Because of the track's deterioration, Amtrak discontinued its Montrealer service on April 5, 1987.[4] Pet. App. 9a, 121a-122a.

Convinced that B&M would not upgrade the track to the condition Amtrak required, Amtrak explored whether Central Vermont, which owned other portions of the Conn River Line, would do so. After discussions, Amtrak and Central Vermont agreed to the following terms: (1) Amtrak would exercise its condemnation power under Section 402(d) to acquire the track in question from B&M; (2) Amtrak would immediately reconvey the track to Central Vermont; (3) Central Vermont would repair and rehabilitate

[3] B&M used the track only for freight service, see *Boston & Maine Corp. Discontinuance of Trains*, 328 I.C.C. 594 (relieving B&M of obligation to provide passenger service), aff'd *sub nom. Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80 (D. Vt. 1967) (3-judge court), and did not need to run high-speed trains.

[4] In 1987, Amtrak instituted an arbitration proceeding claiming that B&M had breached its maintenance obligations; B&M refused to arbitrate, claiming that the trackage rights agreement had expired. The D.C. Circuit eventually ordered B&M to arbitrate the dispute. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756, 758 (1988). Subsequently, the arbitration panel concluded that B&M had breached its obligation to use its best efforts to maintain the track at the minimum speeds required by Amtrak; the panel found that B&M had deliberately allowed the line to deteriorate and had made essentially no efforts to maintain it. B&M had taken this course of action because its parent company had decided to devote energies and funds to maintaining a parallel rail line that the parent controlled. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, Nos. 72 & 74 (Nat'l Arb. Panel Nov. 7, 1988).

the segment to meet Amtrak's standards; (4) Central Vermont would grant trackage rights to B&M for it to serve its existing customers; and (5) Amtrak would be granted trackage rights for its Montrealer service for 20 years. Amtrak's responsibility for payments for rehabilitation of the track was capped at $3.1 million, with funds to come from a $5 million grant that Congress had appropriated for Amtrak to use in restoring Montrealer service.[5] Pet. App. 10a-11a, 41a-42a, 122a-123a, 130a n.11.

2. As a prerequisite to invoking condemnation, Amtrak offered to purchase the segment of track from B&M. After B&M refused the offer, Amtrak requested the ICC to institute condemnation proceedings under Section 402(d). In addition, Central Vermont requested an exemption from ICC regulation for its acquisition of the former B&M line from Amtrak.[6] Pet. App. 12a, 29a-30a, 119a-120a, 125a. After noting that "this is an extraordinary proceeding," marking only the first decided case in which Amtrak had invoked Section 402(d), Pet. App. 39a, the ICC approved the applications of Amtrak and Central Vermont. *Id.* at 29a-109a.

[5] Act of July 11, 1987, Pub. L. No. 100-71, 101 Stat. 447-448 (providing funding to improve track as needed "to restore railroad passenger service between Springfield, Massachusetts and Montreal, Canada through Vermont").

[6] The transfer to Ceneral Vermont was subject to a requirement of ICC approval under 49 U.S.C. 11343. Pursuant to 49 U.S.C. 10505(a), however, the ICC is required to exempt a transaction from regulation when it finds that application of a provision of the Interstate Commerce Act is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and either the transaction's scope is limited, or regulation "is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a)(2)(B).

In its interim and final decisions, the ICC rejected B&M's plea to convert Amtrak's condemnation application under Section 402(d) into a request for prescribed trackage rights under Section 402(a).[7] It found that Amtrak had an "election of remedies" to proceed under Section 402(d), and pointed out that "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service."[8] Pet. App. 39a, 115a-116a. The ICC further found that Amtrak had a legitimate purpose for the acquisition and was not abusing its condemnation powers to advance private aims of Central Vermont or its parent company, the Canadian National Railway. *Id.* at 41a-43a. The ICC responded to the concern raised by B&M that Amtrak's interpretation of the statute would "encourage any freight railroad to acquire ownership of a competitor's line simply by currying Amtrak's favor and agreeing to grant trackage rights to the former

[7] Section 402(a) provides, in pertinent part, that if Amtrak cannot agree with a railroad on a contract for the use of the railroad's tracks, the ICC "shall, * * * if it finds that doing so is necessary to carry out the purposes of this chapter, order * * * the use of tracks * * * on such terms and for such compensation as the Commission may fix as just and reasonable." 45 U.S.C. 562(a).

[8] The ICC noted B&M's claim that it stood ready to restore the track if adequately compensated, and that it would submit to a third party decisionmaker (such as the ICC) the issue of how to allocate costs to maintain the line at the speeds required by Amtrak. But the ICC found that nothing in the Act *demanded* that Amtrak pursue trackage rights procedures rather than invoking condemnation-and-transfer procedures. Pet. App. 114a-116a.

owner," by noting that the Commission's regulatory review of Amtrak's transfer of condemned property to another railroad would prevent any abuses. *Id.* at 43a.[9]

The ICC also concluded that Amtrak's statutory "need" for the conveyance was established. See 45 U.S.C. 562(d)(1)(A) and (B). The Commission found that "there is no adequate alternative property available for Amtrak to acquire" for its Montrealer service because Amtrak desires to route the Montrealer through Vermont, and alternative routes are prohibitively expensive to rehabilitate. Pet. App. 45a-46a. The ICC also found that B&M would not suffer "significant impairment" in its common carrier operations because it will receive just compensation for its property and can continue to serve local traffic under a trackage rights agreement. *Id.* at 46a. Having approved the condemnation, the ICC then exempted from regulation Amtrak's conveyance of the line to Central Vermont, finding that the competitive situation on the Conn River Line would not be adversely affected (and, indeed, would be improved), and that B&M as well as Central Vermont would benefit from "rehabilitation of the line" which was "desperately in need of maintenance." *Id.* at 84a.

Pursuant to the ICC's orders, B&M's line was conveyed to Amtrak for just compensation, and Amtrak immediately reconveyed the line to Central Vermont. Applying funds provided by Amtrak, Central Vermont upgraded the track, and Montrealer service resumed in July 1989. Pet. App. 13a.

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[9] The ICC declined to address B&M's claim that the condemnation power, as construed by Amtrak, was unconstitutional, but noted that it believed that the condemnation power exercised here fulfilled a valid public purpose. Pet. App. 44a-45a.

C. The Court of Appeals' Decision

1. On B&M's petition for review, a divided court of appeals set aside the ICC's order approving the conveyance of the line to Amtrak. Pet. App. 5a-23a. The majority declared that under the terms of the statute, Amtrak was not authorized to exercise condemnation power "to force the conveyance of property from one private owner to another" because such a transaction did not satisfy Section 402(d)'s provision that condemned property must be "required for intercity rail passenger service" by Amtrak. In this case, the court of appeals stated, Amtrak did not "require" title to the entire fee interest in B&M's line, but needed only *use* of the rail line in a condition adequate for Montrealer service. To obtain that interest, Amtrak could have invoked the mandatory trackage rights procedures established by Section 402(a). Moreover, the court thought that permitting this transaction would compromise a statutory policy against cross-subsidization of one segment of the rail industry by another, because it would invite Amtrak to shop for a below-cost provider of trackage rights. Finding the statute to be "unambiguous" on this point, the court declined to defer to the ICC's contrary interpretation of Section 402(d). Pet. App. 16a-18a, 20a, 22-23a.

In the alternative, the court of appeals concluded that the ICC had not sufficiently explained why Amtrak's "need" was established under Section 402(d)(1)(A) and (B). In criticizing the ICC's finding that B&M's operations would not be significantly impaired, the court found error in the ICC's reliance on the trackage rights agreement that B&M would be granted; according to the court, the statute mandates consideration of the impact of the conveyance itself without regard to post-conveyance "remedies aimed

at ameloriating the impairment." Pet. App. 19a. The court also rejected the ICC's finding that Amtrak had no adequate alternatives to condemning the fee, because the ICC had not explained why the lesser interest of an easement for use of B&M's track, or prescriptive trackage rights, would be inadequate. *Id.* at 19a-20a.

Finally, the court found its construction of the statute to be confirmed by the constitutional questions it thought would be raised if Amtrak were empowered to condemn private property to transfer it to another private owner, and the absence of a clear statement from Congress that it intended to permit that result. Pet. App. 21a-23a.

Judge Ruth B. Ginsburg concurred in the judgment, but disagreed with the majority's interpretation of the statute. She concluded that even when Amtrak's ultimate goal is only the use of the track, Amtrak is not precluded from condemning a fee interest, provided the transaction is necessary to enable Amtrak's passenger service to go forward. In her view, a railroad's intransigence in refusing to restore track that Amtrak needed to use would satisfy that test. Although Amtrak advanced such an account of events, she believed the ICC had not made a specific determination crediting Amtrak's story. Accordingly, Judge Ginsburg concluded that a remand was required. Pet. App. 24a-27a.

2. The ICC and Amtrak petitioned for rehearing. While the petitions were pending, Congress amended the statute to overturn the majority's construction—and, specifically, to permit the present transaction to be consummated [10]—by adding to Section 402(d)(1)

[10] See 136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990) (statement of Sen. Jeffords).

the provision that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a), 104 Stat. 4658, amending 45 U.S.C. 562(d)(1) [hereinafter ISBA]. The amendment was explicitly made applicable to pending cases. § 9(b), 104 Stat. 4658.

The court of appeals nevertheless denied the petitions for rehearing. The majority interpreted the amendment to apply only to conveyances that occur *after* Amtrak has properly condemned property; the court proclaimed that the amendment did not alter the limitation on Amtrak's condemnation authority that the subject property must be "required for intercity rail passenger service"—a requirement that, in the court's view, could not be fulfilled when Amtrak could have "instead achieve[d] the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power." Pet. App. 3a. The court further stated that its holding rested on perceived deficiencies in the ICC's findings under 45 U.S.C. 562(d)(1)(A) and (B) with respect to Amtrak's "need" for the property, and that those holdings were not affected by the amendment. Pet. App. 3a. Judge Ginsburg reiterated her disagreement with the majority's interpretation of the statute, concluding that the amendment "coincide[d]" with her view that the ICC had "plausibly interpreted * * * 45 U.S.C. § 562." *Id.* at 4a.

SUMMARY OF ARGUMENT

At issue in this case is the ICC's order approving Amtrak's condemnation of a segment of one railroad's track and its reconveyance to another railroad—a transaction that Amtrak thought necessary to ensure responsible, reliable, and efficient maintenance of the track and the resumption of Amtrak's Montrealer passenger train service. The court of appeals invalidated the ICC's order. In direct response to the court of appeals' decision, Congress amended Section 402 (d) to reject the court's mistaken interpretation of the law. The court of appeals failed to give effect to that determination as well. Because the court of appeals erred in refusing to follow Congress's clearly expressed intent, its judgment should be reversed.

A. The effect of the amendment is properly understood against the background of the original law. Under the original version of Section 402(d), the ICC interpreted the statute to authorize Amtrak's condemnation of B&M's track in order to convey it to another railroad. Section 402(d) does not speak directly to this issue, and, accordingly, the ICC's reasonable interpretation of the statute should be upheld. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The court of appeals thought that the phrase "required for intercity rail passenger service" in Section 402 (d), which describes the type of property interest that Amtrak may condemn, unambiguously meant that Amtrak must desire to own the property itself. Nothing in the statutory language compels that reading, however, and there is an equally reasonable interpretation —which the ICC's order embraces—that "required for intercity passenger service" simply means that

the property to be condemned must be put to use in Amtrak's provision of such service.

The court of appeals also erred in finding that the structure of the statute prohibits Amtrak from condemning track that it intends to convey to another railroad while retaining trackage rights for Amtrak's trains. The court noted that Section 402(a), 45 U.S.C. 562(a), allows Amtrak to apply for prescriptive trackage rights in appropriate cases. But nothing in the statute requires that Amtrak seek trackage rights in lieu of condemnation. To the contrary, that is not among the limitations on Amtrak's condemnation authority that the statute specifies. The statute as a whole demonstrates that Congress's intention was to afford Amtrak a range of remedies to suit the problems it would encounter in building and maintaining a network of passenger train routes. The choice among those remedies is left to Amtrak's business judgment, subject to ICC oversight.

The court of appeals went beyond the proper scope of judicial review in balancing the competing policies implicated by Amtrak's action here. Not only is the responsibility to make such policy choices vested in the ICC, but the court's ultimate conclusion, which strips Amtrak of an important remedy for securing fair arrangements with the freight railroads, is directly contrary to Congress's purposes in enacting Section 402(d).

B. The 1990 amendment to Section 402(d) removes any doubt that the ICC's order should be upheld. The amendment states that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." The only plausible interpretation

of that language—particularly when read in light of its history—is that Amtrak may seek a greater property interest than it intends to retain, without jeopardizing its right to a condemnation order under Section 402(d). The court of appeals' contrary reading effectively nullifies the amendment.

C. The court of appeals' alternative holding—that the ICC failed to make findings to establish Amtrak's statutory "need" for the property—is also flawed. Unless the ICC finds that the taking will impair the railroad's common carrier functions *and* that Amtrak has alternative property interests available to it, Amtrak's need is established under the statute. The ICC found that B&M would not suffer impairment as a common carrier because it retained the right to operate trains over its former line as a condition of the condemnation, and, in any event, no other rail route would allow Amtrak to serve the New England States. The court of appeals' disagreement with that analysis rests on a rejection of the ICC's interpretation of the statute; that holding cannot be reconciled with *Chevron*.

D. Under a proper interpretation of the law, the ICC's order allowing the conveyance of B&M's line should be upheld. The property at issue in this case is required for the provision of Amtrak's Montrealer train service; Amtrak's statutory "need" is established; and the ICC's findings make clear that the reconveyance to Central Vermont of the former B&M track furthers the purposes of RPSA.

ARGUMENT

Amtrak Is Authorized By Section 402(d) Of RPSA To Condemn The Track Of One Railroad And Then Reconvey That Track To Another Railroad

Congress has now spoken to the issue in this case. After the court of appeals wrote its initial opinion, Congress amended Section 402(d) to make the controlling rule of law crystal clear: when the overall transaction furthers the purposes of RPSA, Amtrak *can* have rail property conveyed to it and then reconveyed to another railroad. That is exactly what happened here with respect to Amtrak's condemnation of B&M's track for the purpose of conveying it to Central Vermont. The amended Section 402(d) was enacted expressly to overrule the court of appeals' legal interpretations and establishes that the ICC's order in this case should be upheld.[11]

To put the amendment in context, we show that (1) under the original version of Section 402(d), the ICC permissibly interpreted the statute to authorize Amtrak's condemnation of B&M's track; (2) the amendment reaffirmed the ICC's interpretation and rejected the court of appeals' contrary reading of the statute; and (3) the court of appeals' alternative holding—that Amtrak did not establish its statutory "need" for the property—is based on legal error.

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[11] Congress provided that the amendment "shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any proceeding pending before any Federal court on such date of enactment)." Pub. L. No. 101-641, § 9(b), 104 Stat. 4658. As the court of appeals recognized, the provision therefore applies to this case. Pet. App. 3a. It is well settled that when Congress intends a new provision of law to apply to pending cases, that intent is controlling. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 110 S. Ct. 1570, 1577 (1990).

A. Section 402(d), As Originally Enacted, Authorized Amtrak To Acquire And Then Convey B&M's Track

1. The court of appeals concluded that RPSA's Section 402(d), as originally written, was "unambiguous" in precluding Amtrak from condemning rail property for the purpose of conveying that property to another railroad. Pet. App. 23a. That holding purported to rest on the "plain meaning" (*ibid.*) of the phrase in Section 402(d) that Amtrak's condemnation power applies only to property "required for intercity rail passenger service." 45 U.S.C. 562(d). The language, structure, and policies of the statute lend no support to the court of appeals' conclusion that Section 402(d) has a single, unambiguous meaning that conflicts with the ICC's interpretation. When "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Co.*, 111 S. Ct. 615, 624 n.5 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988).

Section 402(d)(1) states in relevant part:

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the [ICC] for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on reasonable terms and conditions, including just compensation.

45 U.S.C. 562(d)(1).

That language does not directly answer the question whether Amtrak can condemn rail property and then convey it to another railroad. A natural reading of the statute is that where Amtrak has made a reasonable business judgment that acquisition of property will promote intercity passenger service, the ICC is empowered, if the parties cannot agree on a sale, to order its conveyance upon making a statutory finding of "need"; the provision is silent on the possibility of subsequent reconveyance. The property to be condemned must be "required for intercity rail passenger service"; this implies that Amtrak may not condemn property for reasons unrelated to its train services.[12] But the use of the word "required" does not dictate that ownership of the property must be indispensable to Amtrak. Property that is "required for intercity rail passenger service" may also include property that is useful or appropriate to Amtrak's provision of intercity rail passenger service. See Webster's *Third New International Dictionary* 1929 (1986) (defining "require" to include the meaning "to call for as suitable or appropriate in a particular case."). The ambiguity in the statute was for the ICC to resolve. Cf. *Sullivan* v. *Everhart*, 110 S. Ct. 960, 966 (1990) (relying on alternative dictionary definitions to establish ambiguity).

In this case, Amtrak intended to use B&M's property for the provision of intercity rail passenger service on the Montrealer train; the condemnation and transfer of the fee interest to Central Vermont was

[12] For example, if a railroad happened to own an airport, Amtrak could not invoke Section 402(d) to condemn it. Property that could not and would not be used in the provision of rail passenger service would not qualify as property that is "required for intercity rail passenger service."

integral to that goal. In upholding the condemnation, the ICC's order manifests the view that B&M's tracks were, as Amtrak had alleged, "required" for Amtrak's service. Pet. App. 39a-40a, 116a. Nothing in Section 402(d)'s language prohibits the ICC from interpreting RPSA to permit Amtrak to condemn a fuller property interest than it intends to retain, so long as the overall transaction promotes Amtrak's rail passenger service and the statutory standard of "need" for the property is met. 45 U.S.C. 562(d)(1). Because Section 402(d) may reasonably bear the ICC's interpretation, under *Chevron* the court of appeals erred in substituting its own.[13]

2. The structure of the statute supports the Commission's interpretation and certainty does not require a different result. The court of appeals erroneously perceived an "interplay" within Section 402 that requires Amtrak to rely on prescribed trackage rights under subsection (a) rather than exercising the power of condemnation-and-reconveyance under subsection (d) when Amtrak's ultimate goal is to be the user, rather than owner, of the track. Pet. App. 22a. Subsection (d) does not even refer to subsection (a), let alone condition the exercise of condemnation power upon the exhaustion of prescriptive trackage rights. As the ICC found, Amtrak has an "election of remedies" to invoke the condemnation power, provided it can satisfy the express statutory requirements set forth in that provision.[14] *Id.* at 39a, 116a.

The court of appeals erred in assuming that, if there is any overlap in the coverage of subsections (a) and (d), the statute requires Amtrak to apply for relief only under subsection (a). Nothing in the statutory language suggests, let alone compels, such an interpretation. Section 402 provides a range of remedies for Amtrak to employ in gaining the use of a recalcitrant railroad's tracks, and more than one remedy can apply to a single dispute. For example, if Amtrak wants to run a high-speed train over the tracks of a freight railroad and the railroad resists making the tracks available for such accelerated speeds, Amtrak could consider (1) applying for a prescribed trackage rights agreement under Section

[13] The reasonableness of the ICC's interpretation is underscored by the fact that the Second Circuit has construed identical language in the non-rail counterpart to Section 402(d) to permit Amtrak to condemn property and then transfer it to another owner, where the property would then serve to facilitate Amtrak's passenger service. Section 305(d), 45 U.S.C. 545(d), which was enacted contemporaneously with Section 402(d), states that Amtrak may acquire by eminent domain non-rail private property *"which is required [for] intercity rail passenger service."* 45 U.S.C. 545(d) (emphasis added). In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), cert. denied, 484 U.S. 954 (1987), the court of appeals interpreted that provision to allow Amtrak to condemn property adjacent to Amtrak's right-of-way, so that Amtrak could transfer the fee interest to a municipal owner who would construct a road over which Amtrak would retain an easement for use in servicing its track. There is no reason to read the phrase "required for intercity rail passenger service" differently under Sections 305(d) and 402(d). The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990).

[14] None of the procedures can be initiated except upon the application of Amtrak. 45 U.S.C. 562(d). As the ICC noted, Amtrak did not request the ICC to order remedies other than condemnation, because "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a.

402(a); (2) invoking condemnation under Section 402(d); (3) seeking an order "requiring the railroad to permit such accelerated speeds" under Section 402(f); or (4) seeking an order requiring the "operation of an additional train" under Section 402(g). Those remedies afford different benefits to Amtrak, and nothing in the statute dictates which mechanism Amtrak must prefer, if it can satisfy the criteria for more than one form of relief.[15]

Indeed, the logic of Section 402(d) strongly suggests that Congress did not intend the phrase "required for intercity rail passenger service" to contain an unstated requirement that Amtrak seek the lesser interest of trackage rights, or condemn only an easement, where Amtrak's ultimate aim is use of the tracks. Congress gave detailed consideration to the issue of what lesser interests Amtrak had to accept as reasonable alternatives to condemnation, and spelled out its answer in Section 402(d)(1)(B). Under that subsection, if condemnation will significantly impair the railroad's common carrier functions, Amtrak's "need" for the property will not be presumed where Amtrak's requirements can adequately be met by obtaining either of two alternative property interests: (1) other rail property that is "available" for sale, or (2) non-rail property that can be taken by eminent domain. See pp. 32-33, *infra*. Pre-

[15] Here, for example, even if Amtrak could have obtained trackage rights under Section 402(a), Amtrak stood to acquire more than just use of the track from the condemnation of B&M's property and its transfer to Central Vermont. The transaction also guaranteed Amtrak the "rehabilitation of the rail line, a guaranteed 20 years of proper maintenance on the rail line, and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level." Pet. App. 42a (footnote omitted).

scriptive trackage rights were not among the alternatives that Congress required Amtrak to consider. The court of appeals undermined Congress's determination in Section 402(d)(1)(B) by imposing an additional proviso limiting the use of condemnation procedures.

3. The court of appeals also surmised that Amtrak's use of Section 402(d) in this case "implicates * * * Congress's policy against cross-subsidization within the rail industry." Pet. App. 2a. As an initial matter, the court of appeals erred in finding that this policy has any bearing on the arm's length transaction that Amtrak entered into with Central Vermont in this case.[16] But there is a further, funda-

[16] To begin with, RPSA establishes as a goal for Amtrak "[e]ncouragement of * * * the private sector to share the costs of operating rail passenger service * * * in order to minimize Federal subsidies" and "[d]evelopment of service on rail corridors, subsidized by * * * private parties." 45 U.S.C. 501a(2) and (7). In any event, no cross-subsidization occurred in this case. As to B&M, the Commission ordered Amtrak to pay $2.37 million for B&M's line in "just compensation"; B&M was therefore not forced to subsidize Amtrak's activities. Pet. App. 105a. As to Central Vermont, it is apparent that B&M and Central Vermont had quite different economic incentives relating to maintenance of the track at issue here, and it is Central Vermont's greater incentive, and not a cross-subsidy, that accounts for Central Vermont's willingness to perform better maintenance on the track. B&M's affiliate, Delaware & Hudson Railway, owns a parallel line of track that B&M's parent favored over the track at issue here. See note 4, *supra*. Therefore, B&M maintained the Conn River line track only in a condition sufficient to serve its slow-moving local traffic. Central Vermont, in contrast, lacks an alternative rail route for through traffic; it therefore had an independent financial incentive for upgrading the track to high-speed condition. J.A. 125.

mental difficulty: in undertaking to reconcile competing policies on an issue where the statute is silent, the court of appeals overstepped its role in reviewing agency action. "Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866.

The statute entrusts to *the ICC* the implementation of general statutory policies, including any applicable policy against cross-subsidization. Two sources of ICC authority serve to protect the federal rail policies implicated by condemnations. First, the Commission has the power to reject proposed condemnations under Section 402(d) if the transaction constitutes an abuse of RPSA.[17] Here, for example, the ICC determined that Amtrak was not using condemnation to further private aims of Central Vermont and its parent company, but was pursuing public purposes in seeking to restore Montrealer train service. Pet. App. 41a-43a. If Amtrak were to condemn property in order to promote a scheme to benefit private parties, ICC regulation would be available and sufficient to guard against consummation of the scheme.

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[17] Congress made that power explicit in ISBA by conditioning retransfers upon an ICC finding that the conveyance "further the purposes" of RPSA, § 9(a), 104 Stat. 4658, but even before the amendment, the ICC had the power to reject abusive applications under Section 402(d). Cf. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 364-366 (1984).

Second, not only the initial condemnation but also the reconveyance of condemned property by Amtrak is subject to ICC regulation. Under 49 U.S.C. 11343, the ICC has express and comprehensive authority to determine, *inter alia*, when carriers may purchase, lease, or contract to operate property of another carrier. Cf. *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 76 (1944). Amtrak, as a common carrier by railroad, is subject to ICC regulation under Section 11343, see 45 U.S.C. 546(a); so too, of course, is any railroad to which Amtrak seeks to convey rail property. Accordingly, if the ICC concludes that a particular reconveyance would compromise any relevant rail transportation policy, see 49 U.S.C. 10101a, the ICC can block the transaction.[18] In this case, for example, the ICC examined the facts and concluded that application of Section 11343 to Central Vermont's acquisition of the Conn River Line was not required to fulfill the rail transportation policy, see 49 U.S.C. 10505(a); accordingly, it exempted the transaction from prior approval requirements. In light of those statutory tools, the court of appeals' categorical prohibition of reconveyance transactions to protect perceived statutory policies would needlessly erode Amtrak's flexibility and denigrate the ICC's express authority to oversee rail industry transactions.[19]

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[18] One component of the rail transportation policy is to further passenger train service. The Commission is to promote an "efficient" and "sound rail transportation system," 49 U.S.C. 10101a(3) and (4), and "[t]ransportation" is defined to include the "movement of passengers." 49 U.S.C. 10102(26).

[19] The court's constitutional concerns (Pet. App. 21a) about the statute as construed by the ICC are also illusory. The

4. The court of appeals' interpretation is also inconsistent with the policies of RPSA. Congress established as "goals" for Amtrak that it shall provide cost-efficient passenger service; that it shall implement "strategies to achieve * * * maximum productivity and efficiency consistent with safe and efficient service"; and that it shall make the "most cost-effective use of employees, facilities, and real estate." 45 U.S.C. 501a(5) and (14). To that end, Amtrak is to encourage "the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities," and "to enter into agreements with the private sector and undertake initiatives which are consistent with

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"public use" requirement of the Fifth Amendment's Taking Clause does not prohibit compensated transfers between private parties so long as "the legislature's purpose is legitimate and its means are not irrational." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 242-243 (1984); see *Berman* v. *Parker*, 348 U.S. 26 (1954). That standard is surely met here. Congress's purpose in enacting Section 402(d) was to further the formation of a nationwide rail passenger system, and it is a rational means of accomplishing that goal to permit Amtrak to condemn property and transfer it to railroads that will better serve Amtrak's needs. The constitutionality of this provision follows *a fortiori* from the decision in *Hawaii Housing Authority*, since the property here is being put to a use more generally available to the public. Moreover, it is settled that the public purposes served by a national rail system may take precedence over the interests of particular private owners. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 491-492 (1970). Indeed, the court of appeals did not deny that Congress *could* empower Amtrak to effectuate the transaction at issue if it gave "clear[] evidence" of its intent. Pet. App. 21a. Clearer authorization than passage of ISBA in direct and immediate response to the panel's decision in this case can scarcely be imagined. See pp. 26-29, *infra*.

good business judgment and designed to maximize its revenues and minimize Federal subsidies." 45 U.S.C. 501a(2) and (14).

The court of appeals' decision frustrates those policies. Under the court's decision, Amtrak is denied a vital remedy afforded by Congress to prevent disruptions to its intercity passenger service and to lower its operational costs. Because Amtrak's mission is to run passenger trains, it rarely requires exclusive use of a line of track. Especially outside the northeast corridor, it is neither efficient nor feasible for Amtrak to make do on its own; it must be able to share the freight railroads' existing track systems. Amtrak's sharing options are relatively limited in some regions of the country; only one set of tracks is adequate for particular routes. Amtrak must accordingly gain access to reliably maintained tracks on the particular lines it needs.

It is precisely that inflexibility in requirements and lack of negotiating leverage that Congress intended to remedy through Section 402(d). Congress was aware that Amtrak's "inflexible site requirements" might leave it open to economic exploitation by the railroads, see S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973); the legislative solution was to open up the possibility of condemnation—and to ensure that it would proceed quickly.[20] Although in theory Amtrak remains free under the decision below to condemn property if it wishes to become the ultimate owner of the track, that option is a hollow one in most set-

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[20] Under 45 U.S.C. 562(d)(2), the ICC must expedite condemnation proceedings and issue its order no later than 120 days from Amtrak's application. See Pet. App. 124a-125a (ICC expedited this proceeding because of Amtrak's concerns, *inter alia*, that swift measures were necessary to avert further deterioration of the track and to complete the repair before the winter freeze).

tings, for Amtrak lacks both the resources and the expertise to take on the responsibility of owning short stretches of widely dispersed lines. As the concurrence below recognized, the court of appeals' interpretation therefore leaves Amtrak "vulnerable to just the sort of extortion by private landowners pointed to by [the majority] as having motivated Congress to confer the eminent domain power contained in section 402(d)." Pet. App. 27a.[21]

B. The 1990 Amendment Of Section 402(d) Confirms That Amtrak Is Entitled To Condemn B&M's Track And Convey It To Another Railroad

If there were any doubt that the ICC correctly determined that Amtrak has the right to condemn the track at issue, notwithstanding its desire to convey

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[21] The inadequacies of the alternative remedies left to Amtrak under the court of appeals' holding are demonstrated by this case. Before resorting to condemnation, Amtrak attempted to enforce its contractual right to have B&M maintain the Conn River Line in condition fit for high-speed travel. But B&M refused to negotiate or arbitrate, and, indeed, repudiated its contract with Amtrak. See Pet. App. 130a n.11. To compel arbitration, Amtrak was forced to invoke the assistance of the courts. See note 4, *supra*. Litigation of that nature is inherently time-consuming, and, even if Amtrak obtains a favorable decision, it may have to suspend service before the proceedings produce results, as happened in this case. Congress intended through RPSA to provide the means for continuous and reliable intercity rail passenger service. See 45 U.S.C. 501a(6) and (8) (establishing as goals for Amtrak to operate trains "within 15 minutes of the time established in public timetables" and to implement schedules that "provide a systemwide average speed of at least 60 miles an hour, and which can be adhered to with a degree of reliability and passenger comfort"). Those goals were thwarted in this case.

that track to Central Vermont, Congress removed that doubt in ISBA.

1. In direct response to the court of appeals' decision in this case, Congress amended Section 402(d) to clarify that a plan by Amtrak to reconvey condemned rail property after condemnation is not grounds for denying the condemnation under RPSA. ISBA amends Section 402(d) to add, as the final sentence of that subsection:

> The Corporation may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act.

Pub. L. No. 101-641, § 9(a), 104 Stat. 4658. The sponsor of the amendment, Senator Jeffords, explained that it was "intended to clarify the authority used by [Amtrak] in 1988 * * * to acquire a portion of the Montrealer route in the States of Vermont and New Hampshire."

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired. * * *
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purposes under [RPSA], as it did in the Montrealer situation. This leaves the structuring of the nationwide rail passenger system to Amtrak's considered discretion, as [RPSA] intends.

136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990). ISBA resolves conclusively the validity of the type of condemnation at issue here.

2. Rather than faithfully applying this amendment, the court of appeals dug in its heels and effectively nullified it. The court dismissed the amendment by characterizing it as providing authority for Amtrak only to convey property after a valid condemnation; the court refused to accept that Congress had overruled the court's conclusion that rail property cannot be condemned where Amtrak could get by with a lesser property interest or with trackage rights. Pet. App. 3a. The court's interpretation not only flies in the face of congressional intent, it also eviscerates the amendment. It ensures that whenever Amtrak intends to convey property it has condemned, the condemnation will be invalid because Amtrak—by definition—will be seeking a greater property interest than it intends to retain.

The result under the court of appeals' approach is that the amendment will serve no purpose at all. Amtrak did not require the authority set forth in the amendment in order to reconvey property acquired through condemnation. Amtrak is vested with the normal powers of a District of Columbia corporation, see 45 U.S.C. 545(a), and can transfer rail property if it complies with regulatory provisions in the Interstate Commerce Act, see 49 U.S.C. 11343. The amendment makes sense only if read to authorize Amtrak to do exactly what it did here: condemn a property interest for the purpose of transferring that interest to another party, provided the ICC finds that the transaction "further[s] the purposes" of RPSA. By making the amendment wholly superfluous, the court's reading grossly abandons the normal rule of statutory construction that "a court should give effect, if possible, to every clause and word of a statute," *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990)

—an error that is all the more egregious here because the amendment was plainly designed to correct the court's mistaken statutory holding in this very case.

3. The court's refusal to recognize ISBA's rejection of its legal theory thwarts the continuing fulfillment of a policy objective to which Congress has given special attention: the rehabilitation and maintenance of the Montrealer. Twice in the past three years Congress has taken specific legislative action to fund and repair the segment of track at issue in this case. Congress obviously intended to secure uninterrupted passenger train service to Vermont in particular and the New England States in general. The decision below prevents Amtrak from achieving that important congressional goal. If ownership of the track reverts to B&M, passengers, state governments, and businesses that depend on reliable public transportation service to this region of the country may well be denied a means to that end that Congress plainly desired them to have. There is no basis for construing the amended Section 402(d) to require that result.[22]

C. The ICC Properly Determined That Amtrak's Statutory Need For B&M's Line Was Established

In setting aside the ICC's order, the court of appeals also relied on what it stated was an alternative ground for decision. The court said that the ICC did

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[22] When it had ownership of the segment at issue, B&M allowed the track to deteriorate to the point where Amtrak's trains averaged 17 miles per hour, which prolonged each trip by two hours. See J.A. 41, 43. Two years elapsed before Amtrak, aided by a special congressional grant, was able to resume service over the line. Without Section 402(d) as a remedy, Amtrak would again encounter great difficulties in preventing the line from falling into disrepair.

not make "adequate findings" to establish Amtrak's "need" for the property in accordance with Section 402(d)(1)(A) and (B), 45 U.S.C. 562(d)(1)(A) and (B).[23] Pet. App. 3a, 18a-20a. At bottom, the court's attack on the ICC's findings is nothing more than a policy disagreement about what the statute requires the ICC to consider in determining Amtrak's need. Under *Chevron*, the court erred in failing to give deference to the interpretation of the ICC.

1. Section 402(d) declares that Amtrak's "need" for railroad property "shall be deemed to be established" *unless* the ICC finds that (A) conveyance to Amtrak "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* (B) Amtrak can fulfill its obligations by the acquisition of an alternative property interest available for sale on reasonable terms, or available to Amtrak by the exercise of its authority to condemn non-rail private property. The court turned the statutory procedure on its head by stating that the

[23] Section 402(d)(1)(A) and (B), 45 U.S.C. 562(d)(1)(A) and (B, state:

> Unless the Commission finds that—
>
> (A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,
>
> the need of the Corporation for the property shall be deemed to be established.

ICC failed to make adequate findings to demonstrate need. Under the plain terms of the statute, Amtrak's need is presumed, *unless* the ICC makes contrary findings on both of the issues identified in the statute. The ICC is not compelled to make findings that affirmatively demonstrate Amtrak's need.

There is an additional, basic legal error in the court of appeals' approach. The court refused to give deference to the ICC's elucidation of the meaning of the two statutory issues that bear on Amtrak's need. The first issue is whether the taking of the property would "significantly impair the ability of the railroad to carry out its obligations as a common carrier." 45 U.S.C. 562(d)(1)(A). The ICC found that impairment of B&M's common carrier functions is not threatened here because Amtrak was required to pay just compensation for the line, and B&M was offered trackage rights to serve its existing local customers as an integral aspect of the proposed taking.[24] Pet. App. 46a, 83a-84a, 91a-92a. As Judge Ginsburg recognized in her concurring opinion, the ICC's consideration of the trackage rights agreement and its ultimate determination that no impairment to B&M's common carrier functions would result were matters "within the ICC's expertise and entitled to judicial deference." *Id.* at 25a. The majority, however, insisted that post-conveyance remedies are entirely irrelevant to the issue of impairment; instead, the majority held that the evaluation of impairment must be restricted to the effects of the condemnation viewed in isolation. Pet. App. 19a.

[24] Amtrak specifically requested that "the trackage rights over the line for B&M be included as a term and condition of conveyance" to Amtrak under Section 402(d). Pet. App. 38a.

The statute does not dictate that approach, which would impede Amtrak's condemnation of *any* rail property that is useful to the railroad that owns it. As this Court observed in an analogous context, the ICC is not required, in administering its statute, "to put on * * * blinders." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529 (1946). In determining whether there will be common-carrier impairment under Section 402(d)(1)(A), the ICC is entitled to consider the practical results of an overall transaction carried out under Section 402(d). Because the ICC has express authority to impose "reasonable terms and conditions" upon condemnations, 45 U.S.C. 562(d), the agency is well within the bounds of its discretion in taking those conditions into account in determining whether the impairment contemplated by the statute will occur.[25] The court of appeals had no legal justification for dismissing those conditions as "post-hoc" remedies. Cf. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 137 (1978). In this case, there is no basis for disturbing the ICC's exercise of its discretion to determine that B&M's trackage rights agreement would adequately protect B&M's ability to carry out its common carrier obligations.[26]

2. Because the ICC properly found the absence of any impairment to B&M's ability to fulfill its common carrier obligations, Amtrak's statutory need was established without regard to whether Amtrak

[25] The ICC also has the power to impose conditions on the subsequent reconveyance of track. 49 U.S.C. 11344(c).

[26] The ICC's predictive determination about the impact of the transaction on B&M's ability to serve shippers, based on the Commission's familiarity with the industry it regulates, merits special deference. *Bowman Transp.* v. *Arkansas Best Freight System, Inc.*, 419 U.S. 281, 293 (1974); see *FCC* v. *National Citizens Comm'n*, 436 U.S. 775, 813-814 (1978).

had alternative property interests available to it. 45 U.S.C. 562(d)(1)(B). See Pet. App. 25a (concurring opinion). But the ICC also addressed that issue, concluding that no other alternative rail route through Vermont would be feasible for the Montrealer. *Id.* at 45a-46a. The court of appeals rejected that conclusion because the ICC had not considered whether condemnation of a "lesser interest," such as an easement in the *B&M* rail line, would suffice. But it was for the ICC, not the court, to determine whether that was the sort of alternative interest that it had to consider.[27] *Chevron, supra.*

In contrast to the strained reading of the court of appeals, the ICC quite sensibly asked whether there was "alternative" property available in the form of a different route over another railroad's track; it then rejected B&M's proposal that a route through Schenectady, New York, would be sufficient. The ICC explained that such a route would not serve Connecticut, Massachusetts, Vermont, and New Hampshire—all of which Amtrak desired to serve with its Montrealer train. The ICC further explained that any other rail route through Vermont "would require rehabilitation expenditures far beyond the funding sources available to Amtrak." Pet. App. 45a-46a. The ICC's application of the statute in that fashion was entirely reasonable.[28]

[27] Indeed, the plain language of the statute appears to be incompatible with the court's suggestion that trackage rights under Section 402(a) might be an adequate "alternative property" interest. Pet. App. 19a-20a. The statutory alternatives are rail property that is "available for sale" and non-rail property that may be taken by eminent domain under Section 305(d), 45 U.S.C. 545(d). A grant of trackage rights under Section 402(a) does not fit into either category.

[28] Even if the ICC had erred in its interpretation of the statutory criteria for establishing Amtrak's need, the lower

D. The Commission's Order Requiring The Conveyance of B&M's Track To Amtrak And Its Subsequent Reconveyance Should Be Upheld

Under a proper interpretation of the statute, the ICC's order directing the conveyance of B&M's line to Amtrak, and its subsequent transfer to Central Vermont, should be upheld. All of the requirements for conveyance under Section 402(d) were satisfied in this case.[29]

B&M's line was condemned by Amtrak "so that Amtrak may resume its Montrealer passenger service over" the relevant portions of the Conn River Line, Pet. App. 29a, 122a, and was therefore "required for intercity rail passenger service" within the meaning of Section 402(d). In light of ISBA, it cannot be claimed that Amtrak's plan to reconvey the property to Central Vermont is a reason for invalidating the transaction.

Moreover, Amtrak's "need" for the property was established by the ICC's order. The Commission found that the conveyance would not impair B&M's

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court's decision would depart from longstanding principles governing judicial review of administrative action in failing to remand to the ICC for evaluation of the facts in light of the correct legal standard. See *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901); *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); cf. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (per curiam).

[29] As threshold matters, Amtrak and the railroad must be "unable to agree upon terms for the sale" of the subject property and Amtrak must apply for an order of conveyance. 45 U.S.C. 562(d). The ICC properly found that Amtrak's offer to B&M to purchase the Conn River Line, followed by B&M's negative response, adequately demonstrated that the parties were unable to agree, and Amtrak filed the requisite application. Pet. App. 40a, 119a-120a, 130a-131a.

ability to fulfill its common carrier functions, and, in any event, Amtrak could neither buy available rail property nor condemn non-rail property for the purpose of providing passenger train service through Vermont.

Finally, the reconveyance to Central Vermont may be permitted "if such reconveyance is found by the [ICC] to further the purposes" of RPSA. ISBA, Pub. L. No. 101-641, § 9(a), 104 Stat. 4658. Although ISBA was enacted after the ICC issued its order, the Commission's findings demonstrate that RPSA's purposes are furthered in this case. The Commission explained that Amtrak's reason for seeking conveyance of the line—to reinstitute Montrealer service—is a valid "public purpose." Pet. App. 44a-45a. Moreover, the ICC rejected B&M's claim that a decision in Amtrak's favor would lead to abuses of the condemnation power, stating that "[w]e will not permit transfers that are not in the public interest and consistent with the relevant statutory criteria." *Id.* at 43a. Indeed, the ICC specifically rejected B&M's claim that the present transaction was an abuse of the Act.[30] In the light of those findings, which constituted the very model for Congress's enactment of ISBA, the ICC's order allowing the condemnation of B&M's track should be upheld.[31]

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[30] B&M asserted that the present transaction was part of a scheme to further the interests of Central Vermont, a competitor of B&M. The ICC, however, upheld Amtrak's submission that it had negotiated at arm's length to achieve legitimate "public interests" and that Amtrak "has not abused the process available under § 402(d) by means of its dealings with [Central Vermont]." Pet. App. 41a-42a.

[31] Because the court of appeals did not reach the challenges to the ICC's just compensation finding as well as certain

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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other issues raised in the petitions for review, Pet. App. 13a-14a, the case should be remanded for consideration of those issues.

*The Solicitor General is disqualified in this case.

APPENDIX

1. Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d), provides:

> (1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
>
> > (A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
> >
> > (B) the obligations of the Corporation to provide modern, efficient, and economical rail pasesnger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,
>
> the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

2. Section 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4658, provides:

(a) Section 402(d)(1) of the Rail Passenger Service Act (45 U.S.C. § 562(d)(1)) is amended by adding at the end the following new sentence:

"The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of the Act."

(b) The amendment made by subsection (a) shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment).

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IN THE

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OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and
CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the majority of a divided panel for the United States Court of Appeals for the District of Columbia Circuit erred in holding that the National Railroad Passenger Corporation's ("Amtrak's") authority, under § 402(d) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 562(d), to condemn railroad property "required for intercity rail passenger service" unambiguously limits Amtrak to condemning only that property that Amtrak retains for its own use, and thus unambiguously precludes Amtrak from obtaining the use of suitably-maintained tracks by condemning and transferring railroad property from a neglectful owner to a demonstrably more responsible carrier.

2. Whether the majority below erred in refusing to apply, on petition for rehearing, amendments to the RPSA that Congress passed for the express purpose of overturning the majority's initial decision in this case.

3. Whether the Interstate Commerce Commission's allowance of Amtrak's condemnation and subsequent reconveyance should have been upheld by the court of appeals in this case.

PARTIES TO THE PROCEEDING

Other parties to the proceeding in the court below, in addition to those listed in the caption, are the State of Vermont, the Commonwealth of Massachusetts, Windsor Minerals, Inc., Canadian Pacific, Ltd., and the Railway Labor Executives Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1419

NATIONAL RAILROAD PASSENGER CORPORATION and
CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

No. 90-1769

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF RESPONDENTS STATE OF VERMONT AND COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITIONERS

Respondents State of Vermont and Commonwealth of Massachusetts seek reversal of the decisions and judgment of the United States Court of Appeals for the District of Columbia in these consolidated cases.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App.* 5a-27a) is reported at 911 F.2d 743 (D.C. Cir. 1990).

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* "Pet. App." refers to the appendix to the petition filed in No. 90-1419.

The opinion of the court of appeals denying rehearing (Pet. App. 1a-4a) is reported at 925 F.2d 427 (D.C. Cir. 1991). The final decision of the Interstate Commerce Commission ("ICC") (Pet. App. 29a-109a) is reported at 4 I.C.C.2d 761 (1988). Interim decisions of the ICC served July 5, 1988, May 25, 1988, and April 29, 1988 (Pet. App. 110a-112a, 113a-118a, 119a-135a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. Pet. App. 5a. The order of the court denying rehearing was entered on February 1, 1991. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

These consolidated cases concern the proper interpretation of § 402(d) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 562(d). This provision and other related sections of the RPSA are reproduced in Pet. App. 136a-144a. Also at issue is the meaning of § 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (1990), which is reproduced in Pet. App. 145a.

STATEMENT

From 1972 until April 1987, the National Railroad Passenger Corporation ("Amtrak") operated the *Montrealer*, a passenger train that ran from Washington, D.C. to Montreal, Canada via western Massachusetts, Vermont and New Hampshire. During its 15-year run, the *Montrealer* served as the sole passenger line linking Vermont to Canada, and to the northeastern United States seaboard between Boston and Washington, D.C. As such, it carried thousands of residents and tourists in and out of Vermont and other New England states. Pet. App. 128a.

In April 1987, Amtrak was forced to discontinue *Montrealer* service due to the severe physical deterioration of a 48.8 mile stretch of the Connecticut River Line ("Conn River Line") owned by respondent Boston and Maine Corporation ("B&M"). Both before and after discontinuing the *Montrealer*, Amtrak engaged in extensive discussions with B&M concerning maintenance deficiencies on the Conn River Line and, later, Amtrak's possible purchase of the tracks from B&M. When these efforts proved unsuccessful, Amtrak invoked its authority under § 402(d) of the RPSA, 45 U.S.C. § 562(d), for an order of the ICC condemning B&M's track and reconveying that property to the Central Vermont Railway, Inc. ("CV"), a carrier that operated over the line and had committed itself to upgrading and maintaining the tracks to passenger service standards.

The ICC approved Amtrak's application, subject to a grant back to B&M of trackage rights over the line, concluding that § 402(d) permitted Amtrak to condemn and subsequently reconvey B&M's property to another carrier. The court of appeals, however, invalidated the ICC's decision. Viewing the proposed transaction as "a scheme whose purpose was to effect a transfer of B&M's property not to Amtrak, but to Central Vermont" (Pet. App. 17a), the panel majority concluded that Amtrak cannot condemn a fee simple interest it does not intend to retain because, according to the majority, subsequent reconveyance demonstrates that the property is not "required for intercity rail passenger service" under § 402(d). *Id.* at 15a-18a.

While petitions for rehearing were pending, Congress passed the Independent Safety Board Act Amendments of 1990 ("ISBA"), Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (1990), which amended § 402(d) to make clear that Amtrak may condemn property and reconvey it to a third party provided the ICC concludes (as it did here) that the reconveyance furthers the purposes of the RPSA.

Congress expressly made the ISBA applicable to pending cases. The panel majority, however, denied rehearing, deeming the amendment inapplicable to its prior decision. Pet. App. 3a.

The State of Vermont and the Commonwealth of Massachusetts believe that the remarkable decisions below—in which the panel majority not only refused to defer to an authoritative agency interpretation of the RPSA, but also refused to give effect to legislation expressly designed to overrule the panel's initial decision—may well be explained, if not excused, by the majority's misapprehension of the facts of this case. While the States believe the ISBA, as well as principles of agency deference, dictate reversal of the decision below, a description of the underlying facts helps illustrate the propriety of the ICC's initial decision and the errors the court of appeals committed in overturning that decision.

1. Factual Background

Amtrak commenced its *Montrealer* service in September 1972 in response to public demand and congressional direction. Amtrak's two daily trains (one north, one south) between Montreal and Washington, D.C. attracted a significant ridership, consisting largely of passengers seeking access to the Vermont and New Hampshire resort areas; visitors to the cities and towns along the *Montrealer*'s route (which included the major cities of New Haven and Hartford, Connecticut, and Springfield, Massachusetts); local residents traveling to other points on the Amtrak system; and passengers desiring international service to and from Montreal. J.A. 34-35. The *Montrealer* provided the only rail passenger service in either Vermont or New Hampshire. *Id.* at 35.

Like most Amtrak trains, the *Montrealer* operated over track owned not by Amtrak itself, but by freight carriers. The train traversed Massachusetts from Springfield to East Northfield over a B&M portion of the Conn River

Line; it traveled from East Northfield to Brattleboro, Vermont, over CV tracks; from Brattleboro to Windsor, Vermont, it operated again over a B&M-owned portion of the Conn River Line; and from Windsor to the Canadian border, it ran on CV tracks. In 1977, Amtrak negotiated an operating agreement under which B&M agreed to maintain its portions of the Conn River Line to standards that would permit pasenger trains to operate at certain prescribed speeds. *Id.* at 37. In exchange, Amtrak agreed to make significantly higher maintenance payments reflecting this enhanced standard of service. *Id.*

Initially, Amtrak's contractual relationship with B&M was a satisfactory one. Indeed, for several years, the *Montrealer*'s on-time performance over B&M tracks exceeded the Amtrak system average. *Id.* at 38. Amtrak's experience under the agreement, however, changed dramatically after Guilford Transportation Industries, Inc. ("Guilford") acquired the B&M in June 1983, and the Delaware & Hudson Railway ("D&H") in January 1984. Because the D&H provided an alternate route for Canada-bound freight through New York state, the Conn River Line was far less important in the Guilford system than it had been in B&M's. In fact, because B&M's competitor, CV, also used the Conn River Line for its traffic to Canada, Guilford had a strong incentive to favor its D&H route and allow its portion of the Conn River Line to deteriorate.[1]

Such deterioration became all too apparent during the summer of 1985, when maintenance deficiencies led to a rash of freight derailments and a series of speed restrictions that reduced the *Montrealer*'s on-time perform-

[1] Indeed, because the State of Vermont feared that Guilford's competitive interests would lead it to downgrade the B&M line, the State opposed Guilford's acquisition of the D&H. *Guilford Transp. Indus., Inc.—Control—Delaware & H. Ry.*, 366 I.C.C. 396, 408 (1982), *aff'd in part and remanded in part sub nom. Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

ance to approximately 50 percent. *Id.* at 38-39, 84. During subsequent inspections of the line by Amtrak and Vermont officials, B&M explained that it had no plans to perform the work necessary to restore the track to its earlier service standards and in fact was reducing traffic over, and maintenance on, the line. *Id.* at 39. At a December 1985 meeting, senior Guilford officials confirmed that the reduced speeds were compatible with B&M's freight operations, and hence that no significant maintenance program was planned for the Conn River Line. *Id.* at 40.

During the first three months of 1986, the *Montrealer*'s on-time performance continued to average approximately 50 percent. This unacceptable performance was exacerbated by a strike by B&M employees in the spring of that year, which forced a complete suspension of passenger service north of Springfield. *Id.* Between May 24, 1986, when Amtrak resumed service to Montreal, and April 1987, when maintenance deficiencies compelled Amtrak to discontinue the *Montrealer*, not a single passenger train met its contractually agreed upon schedule. *Id.*

Amtrak inspections during the latter half of 1986 and the beginning of 1987 revealed that B&M was allowing the Conn River Line to deteriorate further. Speed restrictions became endemic on the line,[2] such that, by April 1987, the *Montrealer*'s average speeds over B&M's southern and northern segments were reduced to the commercially unacceptable levels of 25.85 and 17.27 miles per hour respectively (*id.* at 41), and the train's running time over B&M tracks was more than two hours longer than it had been in 1981. *Id.* at 43. Amtrak officials, moreover, were repeatedly advised that B&M had no plans to upgrade the line and would only perform the minimum work necessary to meet Federal Railroad Administration ("FRA") requirements for the lowest class of track. *Id.* at 69-71.

[2] While, as of January 1985, none of the line was subject to speed restrictions, by September 1986, 93.8 out of a total of 107 miles were subject to such restrictions; 81.4 of those miles, or better than three-fourths of the track, were restricted to speeds below those specified in the 1977 operating agreement. J.A. 41.

In January 1987, Amtrak informed Guilford that it was imperative that Guilford live up to its obligations under the 1977 operating agreement and increase maintenance on the Conn River Line in order to eliminate the numerous speed restrictions. *Id.* at 43-44. Two months later, in a two sentence reply, Guilford advised Amtrak that it did not intend to perform significant maintenance and that "[n]o appreciable increase in track speed is anticipated." Court of Appeals Deferred Appendix 940. On April 9, 1987, an Amtrak inspection team concluded that "the safe operation of trains over portions of the [Conn River] [L]ine is barely within FRA standards, and could slip out of these tolerances at any given time at any given location." J.A. 70. Following a subsequent inspection in late April, Amtrak concluded that it had no choice but to suspend *Montrealer* service indefinitely.

Thereafter, Amtrak invoked arbitration to compel B&M to live up to its obligations under the 1977 operating agreement. B&M responded by terminating the contract and contesting the jurisdiction of the arbitrators. Following more than a year of litigation, the District of Columbia Circuit ultimately ordered B&M to submit to arbitration.[3] Subsequently, the arbitration panel found that B&M had breached its duty to maintain the Conn River Line to standards permitting operations at the minimum speeds required by Amtrak; indeed, the panel found that B&M had deliberately allowed the line to deteriorate and had made no effort to maintain it.[4]

[3] *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988).

[4] *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (1988) (Nat'l Arb. Panel).

During the course of these protracted proceedings, Congress appropriated $5 million for the express purpose of enabling Amtrak to upgrade the Conn River Line and re-institute *Montrealer* service.[5] As a result, Amtrak met with Guilford officials on July 20, 1987 in an effort to discuss possible resumption of passenger service over the B&M portions of the line. J.A. 47. At this meeting, however, Guilford refused to give assurances that it would provide long-term maintenance of the line; indeed, Guilford officials indicated that they had made no effort to estimate the costs of rehabilitation, and stated that they were considering abandoning the segment altogether. *Id.* For its part, Amtrak made clear that it could not afford to purchase the line in order to operate two trains daily, and that, in order for passenger services to be feasible, the line required significant freight operations—either those of B&M or some other carrier. *Id.* at 132.

The parties agreed to meet a second time approximately one week later, but Guilford subsequently cancelled this meeting. One month later, Guilford advised Amtrak by letter that, while it would be happy to meet, it saw "no purpose in holding another meeting on the subject of the Montrealer." J.A. 65. The following day, B&M amended its System Diagram Map with the ICC in order to slate the Conn River Line for abandonment. *Id.* at 86-87.

At this point, Amtrak turned to CV to explore the possibility of restoring *Montrealer* service. CV had consistently maintained its portion of the Conn River Line to the standards set forth in its operating agreement with Amtrak, and the *Montrealer*'s on-time performance over CV's tracks regularly exceeded 95 percent. *Id.* at 48. Moreover, because CV's freight operations depend on the Conn River Line, Amtrak reasonably assumed that CV would continue to maintain the line after it was upgraded with federal funds. *Id.*

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[5] Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-48 (1987).

While these discusions took place, Vermont officials met with Guilford in early November 1987, to discuss the proposed abandonment. Like Amtrak, state officials learned that Guilford had deferred even routine maintenance on the line; that B&M had no remedial plans to restore the line; and that, if and when B&M reinstituted routine maintenance, it had no need to maintain the track beyond 25 mile per hour capabilities. *Id.* at 87. The State subsequently concluded that the line's deterioration threatened Vermont's entire rail transportation system and was potentially detrimental to the public health and safety. J.A. 89.[6]

Convinced, like Amtrak, that Guilford's financial condition and competitive concerns made it extremely unlikely that Guilford would ever undertake the necessary rehabilitation and maintenance, Vermont began working with CV and Amtrak to restore *Montrealer* service. Following a series of arms-length negotiations, Amtrak and CV entered into an agreement under which 1) Amtrak would acquire B&M's northern segment of the Conn River Line (either through a negotiated sale or its eminent domain powers); 2) CV would reimburse Amtrak for the expense of acquiring B&M's property; 3) Amtrak would commit $3.1 million of its special federal appropriation to rehabilitate the tracks,[7] and CV would assume additional rehabilitation costs, if any; and 4) CV would agree to maintain the tracks to passenger service standards for 20 years. The agreement further provided for a grant of trackage rights to B&M in order to protect the latter's operations over the line. The State of Vermont

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[6] Indeed, during the first half of 1988, several freight derailments occurred on B&M's segment of the Conn River Line. Court of Appeals Deferred Appendix 995.

[7] Amtrak intended to reserve the balance of the $5 million federal appropriation for the eventual rehabilitation of B&M's southern segment of the line between Springfield and East Northfield, Massachusetts.

agreed to provide CV with over $870,000 to help pay for the acquisition of the line and an additional $265,000 for rehabilitation efforts.[8]

On March 18, 1988, Amtrak offered to purchase B&M's northern segment of the Conn River Line for $1 million. Following Guilford's rejection of that offer,[9] Amtrak applied to the ICC for an order pursuant to § 402(d) condemning B&M's property and conveying it to Amtrak for subsequent reconveyance to CV.

2. Proceedings Below

Section 402(d) of the RPSA permits Amtrak to acquire through condemnation "property (including interests in property) owned by [another] railroad and required for intercity rail passenger service" by applying to the ICC for an order establishing Amtrak's "need . . . for the property at issue and requiring the conveyance thereof" to Amtrak on just and reasonable terms, including payment of just compensation. 45 U.S.C. § 562(d). Amtrak's need for such property is *presumed* to be established unless the Commission finds that conveyance of the property would significantly impair the condemnee's ability to fulfill its common carrier obligations *and* that Amtrak's obligation to provide efficient and economical rail passenger service "can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms

[8] See 1988 Vt. Acts (1987 Adj. Sess.) No. 211, Sec. 5 (eff. May 26, 1988). The State's provision of such funding is consistent with the assistance it had provided in the late 1970s to help B&M improve track and related equipment along the Conn River Line, and with the State's grade crossing improvements program, which had historically assigned special priority to Amtrak routes. J.A. 85-86.

[9] Guilford rejected Amtrak's offer by letter dated March 29, 1988. Between the time Guilford received Amtrak's offer and the time it rejected it, B&M amended its System Diagram Map to remove its portion of the Conn River Line from its list of facilities and tracks subject to potential abandonment.

to [Amtrak]," or is available by virtue of Amtrak's § 305(d) authority to condemn non-railroad property. *Id.*, § 562(d)(1)(A)&(B).

In approving Amtrak's exercise of its § 402(d) authority here, the ICC noted that under the RPSA "Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads." Pet. App. 39a. In instituting this "extraordinary proceeding," Amtrak had demonstrated that it had "exhausted all alternatives to condemnation and ha[d] found it necessary to resort to the condemnation powers under § 402(d)." *Id.* Indeed, Amtrak had made clear that "only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." *Id.* at 116a. Finding that "[t]he need for rehabilitation of the line has been clearly established" (*id.* at 85a), that prompt rehabilitation would be in the public interest (*id.*), that Amtrak and CV had engaged in arms-length negotiations "to achieve their respective corporate and public interests, and not to further some impermissible objective" (*id.* at 41a), and that B&M's competitive posture would not be adversely affected by the proposed transactions (*id.* at 83a-84a), the Commission approved Amtrak's condemnation.

In overturning this decision, a divided panel of the District of Columbia Circuit ruled that § 402(d) "unambiguously" precludes Amtrak from condemning an interest in railroad property that Amtrak does not intend to retain. Reasoning that the "statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service,"[10] the majority concluded that,

[10] See Pet. App. 17a (emphasis in original).

because Amtrak did not intend to retain the fee simple interest it had condemned, that interest could not be "required for intercity rail passenger service." *Id.* at 18a. What Amtrak really needed, the majority observed, was use of B&M's segment of the line in a condition suitable for passenger rail service. *Id.* Ignoring B&M's history of intransigence, Amtrak's lengthy efforts to restore passenger service through negotiation and arbitration, and Amtrak's financial constraints, the majority suggested that Amtrak could have obtained use of the line through either of two less drastic means: 1) condemning an easement in B&M's property that would allow Amtrak to maintain the line, or 2) compelling B&M to grant Amtrak trackage rights pursuant to § 402(a) of the RPSA. Amtrak, the majority held, must employ these lesser remedies before resorting to condemnation of a fee simple interest (*id.*), and cannot use its powers of eminent domain simply to "substitut[e] one private owner for another." *Id.* at 20a.

While the case was still pending on rehearing, Congress amended the RPSA specifically to permit the transaction contemplated by the Amtrak-CV agreement. The ISBA authorizes Amtrak to "subsequently convey title or other interest in [Amtrak-condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of [the RPSA]." Pub. L. No. 101-641, § 9(a), 104 Stat. 4654, 4658 (1990). Congress, moreover, expressly made this provision applicable to the still-pending proceeding before the court of appeals. On rehearing, however, the panel majority concluded that the amendment did "not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a. Having previously found that the transaction failed to satisfy this requirement, the majority denied the petition for rehearing. *Id.*

SUMMARY OF ARGUMENT

I. The ICC properly construed § 402(d) of the RPSA to permit Amtrak to condemn and subsequently reconvey the railroad property at issue in this case. As even the majority below recognized, Amtrak's *Montrealer* service required use of suitably-maintained tracks. Neither the plain language nor the structure and history of the statute, however, speak to the precise question whether Amtrak may obtain the use of such tracks by condemning and transferring railroad property from a willfully neglectful owner to another, more responsible carrier. Accordingly, the question was left to the considered judgment of the ICC, the agency charged with administering the statutory provision at issue.

The ICC's determination that Amtrak could redress the chronic maintenance and service deficiencies it faced by transferring ownership of the Conn River Line to a demonstrably more responsible carrier was plainly permissible, and hence is entitled to deference from the courts. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The RPSA confers on Amtrak a number of remedial options, establishes separate criteria governing the availability of each, creates a presumption that Amtrak needs property that it seeks to condemn, and directs Amtrak to take appropriate measures to minimize its dependence on federal subsidies. The structure of the statute, therefore, indicates that Congress intended to give Amtrak broad latitude to decide how best to employ its remedial authority. Contrary to the majority's suggestion below, the "interplay" of Amtrak's optional remedies does not give rise to any exhaustion requirements or otherwise limit Amtrak's discretion, and certainly does not "unambiguously" prohibit the ICC's determination that Amtrak may choose which of its powers is best addressed to a particular service problem.

In the circumstances of this case, the ICC's determination that Amtrak's condemnation power was best suited to the problems arising out of B&M's neglect of the Conn River Line, and that Amtrak's passenger services over that line "required" condemnation and reconveyance of B&M's fee interest to another carrier, were plainly permissible. In view of the extraordinary difficulties B&M's neglect had caused, the ICC properly rejected B&M's claim that Amtrak's needs could be satisfied by acquisition of lesser interests in the line, and the agency's judgment is entitled to deference.

Any doubts concerning the propriety of the ICC's decision, moreover, were definitively laid to rest by passage of the Independent Safety Board Act Amendments of 1990, in which Congress expressly provided that Amtrak may reconvey railroad property it condemns, provided the ICC finds that such reconveyance furthers the purpose of the RPSA. The majority simply side-stepped this amendment, which was unambiguously intended to overrule the majority's initial decision.

II. The majority's additional reasons for invalidating the ICC's decision were meritless. The ICC properly considered and rejected B&M's claim that condemnation of its property would significantly impair its common carrier obligations. The majority below erred as a matter of law, moreover, in holding that the ICC may not consider the ameliorating effects of any conditions it places on a condemnation when considering claims of significant impairment. Finally, the ICC's finding that Amtrak's passenger service required transfer of the Conn River Line from B&M to CV—and that Amtrak's acquisition of lesser interests was an inadequate alternative—were the product of reasoned decisionmaking and are supported by substantial evidence.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION'S DETERMINATION THAT SECTION 402(d) OF THE RAIL PASSENGER SERVICE ACT PERMITTED AMTRAK TO CONDEMN AND SUBSEQUENTLY RECONVEY THE PROPERTY AT ISSUE IN THIS PROCEEDING WAS PERMISSIBLE.

At issue in this proceeding is the propriety of the ICC's interpretation of § 402(d) of the RPSA, a provision the agency is charged with administering.[11] Accordingly, the proper inquiry is whether "Congress has directly spoken to the precise question at issue"—*i.e.*, whether Amtrak may condemn railroad property that it intends to reconvey to another carrier—and, if not, "whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). It is abundantly clear here that Congress did not, in § 402(d), "unambiguously" preclude Amtrak from condemning railroad property that Amtrak intends to convey to another carrier, and that, under the facts of this case, the ICC's interpretation of Amtrak's condemnation authority was entirely permissible.

A. Section 402(d) Does Not Speak Directly To The Question Whether Amtrak May Condemn Property That Amtrak Intends To Reconvey To Another Carrier.

Section 402(d) provides, in relevant part:

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the Commission for an order

[11] Not only does the ICC administer those provisions of the RPSA governing Amtrak's authority to compel use or ownership of railroad property and facilities (see 45 U.S.C. § 562(a)-(d)), but Amtrak's operations are, with certain exceptions noted below, generally subject to the jurisdiction of the ICC. See *id.*, §§ 546, 546a.

establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on reasonable terms and conditions, including just compensation. Unless the Commission finds that

> (A) conveyance of the property to [Amtrak] would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of [Amtrak] to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak] or available to [Amtrak] by the exercise of its authority under section 545(d) of this title;

the need of [Amtrak] for the property shall be deemed to be established and the Commission shall order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation.

45 U.S.C. § 562(d). Notwithstanding this language, the majority below found it "clear enough" that the statutory phrase "required for intercity rail passenger service," "contemplates" that Amtrak may only condemn property it intends to retain for its own use. Pet. App. 17a. Yet, the plain language of § 402(d) says nothing whatever about whether Amtrak may subsequently reconvey property that it condemns, and in fact creates a presumption that Amtrak "requires" property it seeks to condemn.

It is indisputable here that, as the majority itself acknowledged, what Amtrak "required" was the use of B&M's portion of the Conn River Line "*in a condition permitting resumption of the Montrealer service.*" *Id.* at 18a (emphasis added). Section 402(d), however, does not address the precise question whether Amtrak may acquire the use of suitably-maintained tracks by condemning inadequately-maintained tracks and conveying them

to a more responsible owner. Certainly, by its plain terms, the statute does not require that Amtrak obtain the use of such tracks only by condemning the tracks (or an easement in the tracks) and assuming all rehabilitation and maintenance costs itself. Nor, alternatively, does it mandate that Amtrak seek a grant of trackage rights that would leave rehabilitation and maintenance responsibilities with a railroad that has proven unwilling to discharge such duties in the past.

To the contrary, § 402(d) defines the phrase "required for intercity rail passenger service" in strikingly broad terms. Thus, it provides that Amtrak's "need" for the property "shall be deemed to be established" unless the ICC finds *both* that Amtrak's condemnation "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* that Amtrak's needs cannot be "met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak], or available to [Amtrak] by the exercise of its authority" to condemn non-railroad property pursuant to § 305 of the RPSA. 45 U.S.C. § 562(d)(1)(A) & (B). Because an intention to reconvey the condemned property is not among the factors that may rebut the statutory presumption of "need," § 402(d) would appear affirmatively to permit Amtrak to condemn property that it plans to transfer to another, more responsible carrier. At a minimum, the statutory language does not unambiguously prohibit such condemnations.

Nor does the structure of the RPSA definitively preclude Amtrak from condemning property it intends to reconvey. In ruling otherwise, the majority placed great emphasis on the "interplay" of § 402(d) and § 402(a), which permits Amtrak to compel the use of railroad facilities on ICC-prescribed terms and conditions. Pet. App. 22a. According to the majority, subsection (a) affirmatively limits the circumstances in which, and the purposes for which, Amtrak may employ its condemnation powers. See *id.* (ICC's construction of subsection (d)

improperly allowed acquisition of a "larger property interest than subsection (a) permits"); *id.* at 23a ("Congress did not intend to allow Amtrak . . . to circumvent the requirements of section 402(a)"). Subsection (a), however, does not even refer to subsection (d), let alone circumscribe or pre-condition the exercise of Amtrak's condemnation powers under the latter provision. Congress could have imposed less restrictive means or exhaustion requirements had it intended to do so and can hardly be deemed to have "unambiguously" done so here simply by providing Amtrak with remedial choices.[12] Subsections (a) and (d), moreover, set forth Amtrak's rights in purely permissive terms.[13] The "interplay" of two *permissive* remedial provisions cannot reasonably be viewed as unambiguously imposing a *mandatory* pre-condition for the exercise of one of those remedies.

Indeed, the structure of the statute militates strongly against any such pre-condition. First, in § 402(d) Congress expressly spelled out the alternatives Amtrak and the ICC must consider in deciding whether Amtrak

[12] The fact that two broadly remedial provisions may overlap "is neither unusual nor unfortunate," and does not give rise to an inference of mutual exclusivity. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 383 (1983) (citations and internal quotation marks omitted). Moreover, in effectively imposing an exhaustion requirement, the majority overlooked this Court's admonition that decisions concerning the desirability of such requirements "turn on a host of policy considerations which do not invariably point in one direction," and hence "are best left to Congress' superior institutional competence" (*Felder* v. *Casey*, 487 U.S. 131, 148 (1988) (citations and internal quotation marks omitted)), or, alternatively, to the informed discretion of the agency charged with administering the statute. See, *e.g.*, *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. 561, 579-81 (1989) (Bank Board has discretion to impose reasonable exhaustion requirement).

[13] Amtrak "*may* contract with railroads . . . for the use of tracks and other facilities and the provision of services," 45 U.S.C. § 562(a) (emphasis added), and "*may* apply to the [ICC] for an order establishing the need of [Amtrak] for the property" it seeks to condemn. *Id.* at § 562(d) (emphasis added). The only mandatory language in either provision is directed to the ICC.

"needs" the railroad property to be condemned. Although it included among these alternatives non-railroad property available to Amtrak pursuant to its powers under § 305 of the Act, Congress failed to include the lesser interests available to Amtrak under § 402(a). See 45 U.S.C. § 562(d)(1)(B). Second, the RPSA expressly directs Amtrak to "[e]xercise . . . [its] best business judgment in taking actions to minimize Federal subsidies." 45 U.S.C. § 501a(1). The "interplay" of this directive with the permissive language of §§ 402(a) and 402(d) strongly suggests that Amtrak has the discretion to choose which of its available remedial powers to employ when seeking the use of properly-maintained railroad property.

The legislative history the majority cited below further buttresses the conclusion that Congress intended to give Amtrak the discretion to choose between its statutory remedies. In explaining the purpose of subsection (d), the Senate Report noted that

> [a]t the present time [Amtrak] leases terminal and other facilities from various railroads. These facilities are not always best adapted to Amtrak's needs, *nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility*. . . . Giving [Amtrak] the power of eminent domain, coupled with the ability to seek conveyance of the property through the Commission under this section, will insure that Amtrak can acquire the property necessary to perform its public service mission *at a reasonable price*.

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphases added). Far from suggesting that Amtrak must seek prescriptive trackage rights (which are the functional equivalent of lease-hold interests) before resorting to its power of eminent domain, Congress affirmatively indicated that Amtrak could forsake lesser interests and employ its power of eminent domain if it found it more cost-effective to do so.

Finally, the Second Circuit's decision in *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), confirms that the phrase "required for intercity rail passenger service," does not unambiguously preclude Amtrak from condemning property interests it does not intend to retain. In *Two Parcels*, Amtrak condemned non-railroad property pursuant to § 305(d) of the RPSA [14] and reconveyed it to the City of New London, which in turn used the land for a public service road. Amtrak retained only an easement that permitted it to use the road to inspect and maintain certain of its facilities.

Like B&M here, the condemnee in *Two Parcels* argued that, while Amtrak can condemn property for its own use, it cannot condemn property for a third party, *i.e.*, the City of New London. *Id.* at 1265. The Second Circuit found no such limitation in § 305(d)'s requirement—identical to that found in § 402(d)—that the property to be condemned be "required [for] intercity rail passenger service." [15] To the contrary, the Second Circuit deemed this requirement satisfied inasmuch as the property interest Amtrak intended to retain for itself (the easement over the public road) would be used in connection with Amtrak's passenger services. *Id.*[16]

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[14] Section 305(d) provides, in relevant part, that Amtrak may "acquire any right-of-way, land, or other property [except that of a railroad, State, or governmental agency], which is required [for] intercity rail passenger service[,] by the exercise of the right of eminent domain." 45 U.S.C. § 545(d)(1)(B).

[15] As this Court has repeatedly made clear, "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (citations omitted); see also *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983) (same).

[16] On rehearing, the majority below sought to distinguish the decision in *Two Parcels* on the grounds that 1) Amtrak's need for the service road in the latter case was unquestioned, and 2) the Second Circuit was construing § 305 of the RPSA, which makes no

In sum, the language, structure and history of § 402(d) and the RPSA do not speak to the precise question whether Amtrak may condemn property that it intends to reconvey, and certainly do not unambiguously preclude the ICC's affirmative response to that question. To the contrary, the available statutory evidence indicates that Congress intended to give Amtrak the discretion to determine how best its passenger service needs should be met. Indeed, of the six appellate judges that have considered the question, four (including Judge Ginsburg below) have concluded that the phrase "required for intercity rail passenger service" does not limit Amtrak to condemning only those interests in property that it retains for its own use. While Vermont and Massachusetts believe that the construction rendered by the Second Circuit (and Judge Ginsburg) is plainly the correct one, this division within the judiciary establishes, at a minimum, that the relevant statutory language is not so unambiguous as to admit of only one possible meaning. In circumstances such as these, *Chevron* requires the courts to defer to the agency's clearly "permissible construction of the statute." 467 U.S. at 843.

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provision for acquisition of the lesser interests available to Amtrak under § 402(a). Pet. App. 2a. The first distinction, however, simply begs the essential question of what Amtrak "required." As Amtrak and its supporters demonstrated, and the ICC found, in the present case Amtrak required that ownership of the Conn River Line be transferred to a responsible owner. See *infra* at 24-28. The majority's second distinction fails to recognize that § 402(d) creates a *presumption* of need, while § 305 does not. Accordingly, demonstrating need under the former provision should be easier, not harder, than under the latter. In any event, these distinctions do not undermine the essential fact that, by its plain terms, the phrase "required for intercity rail passenger service" does not unambiguously bar condemnation of property interests that Amtrak intends to reconvey.

B. The Interstate Commerce Commission Permissibly Construed § 402(d) To Permit Amtrak To Condemn B&M's Property For Subsequent Reconveyance To Another Carrier.

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," particularly where resolution of a statutory question requires "reconciling conflicting policies, and [where] a full understanding of the force of the statutory policy in the given situation . . . depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote, citation, and internal quotation marks omitted). Here, in the face of ambiguous statutory language, the ICC was called upon to determine whether Amtrak 1) could take railroad property from a carrier whose willful neglect and intransigence had forced the cessation of international rail passenger service and 2) reconvey that property to a carrier that had contractually committed itself to upgrade and maintain the tracks to service standards that would permit resumption of passenger services. In the circumstances of this case, the ICC's determination that such a transaction was "required for intercity rail passenger service" was entirely permissible.

1. The ICC's Determination That § 402 Gives Amtrak The Discretion To Determine Which Of Its Remedial Powers Best Meets Its Passenger Service Needs Was Permissible.

The ICC reasoned that, "under sections 402(a)-(d) of RPSA, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. In each case, relief may be granted only upon application by Amtrak, and in each case different criteria, procedures, and standards apply." Pet. App. 39a; see also *id.* at 115a-116a (same). The ICC's determination that § 402 vests discretion in Amtrak

to choose which of its remedial powers to employ depending upon the service problems it faces is plainly a permissible construction of the statute.

First, as previously noted, the statute sets forth Amtrak's remedial options in permissive language that is entirely consistent with the ICC's finding of discretion. Second, as the ICC observed, the availability of each of the remedies that § 402 prescribes necessarily implies choice: each remedy is independently available to Amtrak provided Amtrak can satisfy the independent prerequisites for each. The obvious import of this statutory structure is that Congress did not intend to limit Amtrak's choice of remedies once the circumstances prescribed by each subsection are shown to exist.

Third, and finally, the RPSA and its legislative history are replete with evidence that Congress intended to afford Amtrak discretion wherever possible. Thus, as previously noted, Congress added § 402(d) to the Act to enable Amtrak to acquire the property interests it needs in the most economical manner possible. See *supra* at 19. Moreover, Congress expressly directed Amtrak to "[e]xercise . . . [its] best business judgment in taking actions to minimize Federal subsidies" (45 U.S.C. § 501a(1)), to "maximiz[e] . . . the use of its resources, including the most cost-effective use of . . . facilities[] and real estate" (*id.*, § 501a(14)), and to "employ[] innovative operating . . . concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity . . . passenger transportation requirements." *Id.*, § 541. To these ends, among others, Congress exempted Amtrak from ICC regulation of its rates and fares, routes and services, and the abandonment or extension of operations over railroad lines "by trackage rights or otherwise." *Id.* § 546(a).[17]

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[17] Ignoring all of this evidence that Congress intended to vest Amtrak with broad discretion, the majority instead relied on an ICC-formulated policy against "cross-subsidization," which, in the majority's view, militated against the ICC's construction of § 402(d). Pet. App. 22a. The force of this policy, however, is diminished in the

Although these congressional directives, along with the language and structure of § 402 itself, may not have compelled the conclusion that Amtrak has the discretion to choose the remedial power best suited to a particular service problem, these indicia of congressional intent undoubtedly afforded the ICC a permissible basis for reaching such a conclusion. Under *Chevron*, that is sufficient to compel judicial deference to the agency's construction.[18]

2. The ICC's Determination That The Condemnation And Reconveyance Of B&M's Property Was "Required For Intercity Rail Passenger Service" Was Permissible.

In view of its entirely reasonable determination that Amtrak has the discretion to choose which of its remedial powers to exercise, the remaining question before the ICC

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context of the RPSA, which "[e]ncourage[s] . . . the private sector to share the costs of operating rail passenger service, including the costs of . . . facilities." 45 U.S.C. § 501a(2). Whatever its applicability, moreover, there is no evidence of an impermissible cross-subsidy here. While the majority speculated that Amtrak was trying "to cajole a railroad into providing more than its share of the maintenance" (Pet. App. 23a), CV simply agreed to assume essentially the same maintenance obligations that B&M, in 1977, had voluntarily assumed in exchange for payments it deemed adequate.

[18] In addition to its erroneous view of the interplay of subsections (a) and (d) (see *supra* at 17-18), and its mistaken belief that CV is cross-subsidizing Amtrak's operations (see *supra* at 23-24 & n.17), the majority suggested that deference was unwarranted because the ICC's construction raised a "colorable" claim that the condemnation violated the "public use" requirement of the Takings Clause. Pet. App. 21a. This suggestion is frivolous. Despite the majority's insinuations to the contrary, the condemnation here was not a "scheme" undertaken simply to restructure property interests between private parties. Pet. App. 17a. Rather, as the ICC found, the taking of B&M's property was necessary to permit resumption of rail passenger service to three different states and between two countries. Indeed, the public purpose of the transaction is demonstrated by the fact that the three affected states supported it, and state and federal funds were appropriated in order to facilitate it. State and federal legislatures surely would not be devoting public resources simply to help one rail carrier acquire 50 miles of another carrier's tracks.

was whether the condemnation of B&M's line and its subsequent reconveyance to CV was "required for intercity rail passenger service." Because § 402(d) expressly spells out the factors that may rebut the presumption that Amtrak needs property it seeks to condemn, and because Amtrak's intention to reconvey condemned property is not one of the rebuttal factors, the transaction at issue here would appear to be entirely within the contemplation of the statute. In any event, the ICC's determination that Amtrak's passenger service "required" condemnation and reconveyance of B&M's portion of the Conn River Line was clearly permissible in the unique circumstances of this case.

The problems confronting Amtrak with respect to its *Montrealer* service were extraordinary. Despite its contractual maintenance obligations, B&M had allowed its portion of the Conn River Line to deteriorate precipitously over the space of two years. By 1987, over 75 percent of B&M's portion of the line was restricted to speeds below those specified in its operating agreement with Amtrak; Amtrak's average speeds over B&M's segments had dropped to 25.85 and 17.27 miles per hour[19] (J.A. 41); and the *Montrealer*'s running time was over two hours longer than it had been in 1981. *Id.* at 43. Despite a spate of freight derailments and repeated requests by state transportation and Amtrak officials for increased maintenance efforts, B&M refused to undertake even routine maintenance on the line and instead slated it for abandonment.

Faced with the need for properly-maintained tracks and a railroad management that proved consistently unwilling to meet its maintenance obligations, Amtrak concluded that intercity rail passenger service through Vermont and New Hampshire "required" a transfer of own-

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[19] Not only were such speeds commercially unacceptable, they impaired Amtrak's ability to satisfy Congress' requirement that Amtrak maintain a "system-wide average speed of at least 60 miles per hour." 45 U.S.C. 501a(8).

ership of the Conn River Line from B&M to a carrier that promised to upgrade and maintain the lines and that had an exemplary history of meeting such obligations in the past. Before the ICC, B&M argued that Amtrak could meet its needs by obtaining trackage rights under § 402(a) or by acquiring an easement over B&M's property. Amtrak, however, which has invoked its rights under § 402(a) on numerous prior occasions,[20] deliberately eschewed these alternatives based on its conclusion "that only when the [Conn River] line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a. Based on the overwhelming evidence of B&M's neglect, the ICC found "that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line," and that the

[20] *See, e.g.*, Finance Docket No. 31062, *Amtrak & Soo Line R.R.—Use of Tracks & Facilities & Establishing Just Compensation* (decided April 11, 1988); Finance Docket No. 30426, *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act* (decided July 5, 1985), *aff'd sub nom. Metropolitan Transp. Auth.* v. *ICC*, 792 F.2d 287 (2d Cir. 1986); Finance Docket No. 30557, *Amtrak & Louisiana & Ark. Ry.—Use of Tracks & Facilities & Establishing Just Compensation* (decided September 25, 1984); *Minnesota Transfer Ry. Ordered to Provide Servs., Tracks & Facilities for the Operation of Trains of the Nat'l R.R. Passenger Corp. & the Establishment of Just & Reasonable Compensation for Such Servs., Tracks & Facilities*, 354 I.C.C. 552, *modified*, 354 I.C.C. 769 (1978); *National R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 926 (1977); *National R.R. Passenger Corp. & Terminal R.R. Ass'n of St. Louis, Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 901 (1977), *aff'd sub nom. National R.R. Passenger Corp.* v. *ICC*, 610 F.2d 865 (D.C. Cir. 1979); *Amtrak & the Texas & Pac. Ry., Use of Tracks & Facilites & Establishment of Just Compensation*, 348 I.C.C. 645 (1976), *aff'd in part sub nom. National R.R. Passenger Corp.* v. *ICC*, 610 F.2d 865 (D.C. Cir. 1979); *Amtrak & Washington Terminal Co., Use of Tracks & Facilities & Establishing Just Compensation*, 348 I.C.C. 86 (1975), *modified*, 348 I.C.C. 859 (1977), *aff'd sub nom. National R.R. Passenger Corp.* v. *ICC*, 610 F.2d 881 (D.C. Cir. 1979).

proposed reconveyance to CV did not constitute an "abuse of § 402(d) processes." *Id.* at 43a.

In the circumstances of this case, it was clearly reasonable and permissible for the ICC to determine that a transfer of the Conn River Line from a neglectful owner to a trustworthy one was "required for intercity rail passenger service." In concluding otherwise, the panel majority relied in large measure on its perception that Amtrak could have "commandeered" the use of properly maintained tracks through prescriptive trackage rights available under § 402(a), or by condemning an easement over B&M's lines pursuant to § 402(d). The ICC, however, which possesses far greater expertise respecting such matters (*Chevron*, 467 U.S. at 844), reasonably rejected these alternatives as inadequate.

A grant of statutory trackage rights under § 402(a) would have left Amtrak in precisely the same untenable position it found itself in prior to seeking redress from the ICC. Such trackage rights would have entitled Amtrak to operate over B&M's tracks and required B&M to meet certain ICC-prescribed maintenance obligations. Yet Amtrak already enjoyed these very rights under its 1977 operating agreement with B&M. B&M's willingness to breach its maintenance obligations under that contract, and to terminate the contract when Amtrak sued for specific performance, readily demonstrated the futility of employing this less drastic statutory remedy.[21]

[21] Indeed, Amtrak would have been worse off had it proceeded under § 402(a), inasmuch as that provision requires the ICC to fix compensation for the use of tracks based on the incremental costs associated with Amtrak's operations. While the majority suggested that Amtrak sought to "circumvent" 402(a)'s "requirement" that Amtrak pay such costs (Pet. App. 22a), just the opposite was true: had Amtrak invoked § 402(a), it would have effectively rewarded B&M for breaching a contract in which B&M voluntarily agreed to maintain its tracks to passenger service standards in exchange for specified payments that it had previously deemed adequate. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (1988) (Nat'l Arb. Panel).

Similarly, condemnation of an easement in B&M's property would have saddled Amtrak with the most onerous burdens of ownership without the full benefits. Such a "remedy" would have left Amtrak not only with the burden of upgrading a line that B&M had allowed, through its own neglect, to deteriorate to dangerously unsafe conditions, but also with the burden of maintaining that line not only for its own use but for that of B&M as well. As Amtrak made abundantly clear before the ICC, it could not responsibly spend $5 million in federal funds and assume sole responsibility for maintaining an isolated island of track simply to operate two trains daily. J.A. 128-29; 132. Rather, Amtrak could responsibly spend such funds only in exchange for long-term maintenance commitments from a freight carrier—commitments B&M had proven unwilling or incapable of meeting in the past.

In short, in the circumstances presented here, the ICC reasonably and permissibly concluded that condemnation and reconveyance of B&M's tracks were "required" within the meaning of § 402(d). That judgment, based on the ICC's expertise in railroad matters generally and Amtrak's service needs in particular, was entitled to deference in the court below and should be accorded proper deference here.

C. Any Doubts Concerning The Propriety Of The ICC's Construction Of § 402(d) Were Laid To Rest By The Independent Safety Board Act Amendments Of 1990.

The majority's failure to defer to the ICC's reasonable and permissible interpretation of an ambiguous statutory provision warrants reversal of the judgment below. Even if the ICC's construction of § 402(d) were not entitled to deference, however, the judgment below must be reversed in light of the Independent Safety Board Act Amendments of 1990. These amendments, passed in direct response to the majority's flawed decision, conclusively establish the propriety of the agency's construction.

Enacted while the majority's initial decision was still subject to rehearing, ISBA expressly provides that Amtrack "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the Commission to further the purposes of [the RPSA]." Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658. Congress expressly made the amendment applicable to this case,[22] and the amendment's sponsor, Senator Jeffords of Vermont, explained that the law was prompted by, and designed to correct, the majority's initial decision:

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. *The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired. . . .*
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> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purpose under [RSPA], *as it did in the Montrealer situation.* This leaves the structuring of the nationwide rail passenger system to Amtrak's considered discretion, as [RPSA] intends.

136 Cong. Rec. S17668 (daily ed. October 27, 1990) (statement of Sen. Jeffords) (emphases added).

Incredibly, having previously rejected the ICC's construction of the statute because of the supposed lack of "clearer" evidence that Congress intended to permit Amtrak to condemn interests it subsequently reconveys, the

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[22] The amendment provided that it "shall apply to any proceeding instituted before, on, or after the date of enacement of this Act (including any such proceeding pending before any Federal court on such date of enactment)." ISBA, Pub. L. No. 101-641, § 9(b), 104 Stat. 4654, 4658 (1990). The only pending case involving § 402(d) at the time Congress enacted ISBA—and indeed, the only case ever decided under the provision—was this case.

majority deemed this amendment *irrelevant to this case*. The majority attempted to justify its decision by asserting that the amendment only permits Amtrak to convey property "subsequent to a condemnation that is otherwise valid" (Pet. App. 3a) (emphasis deleted); because Amtrak did not need B&M's fee simple interest in the first place, the majority held, the amendment could not have authorized Amtrak to reconvey that interest to CV. *Id.*

This facile reasoning cannot disguise the fact that, as the majority has defined it, Amtrak's "need" is limited to that property which it intends to *retain for its own use*. Accordingly, because a property interest that Amtrak intends to convey to a third party can never, under the majority's view, be "required for intercity rail passenger service," the amendment can *never* be employed. Any attempt to invoke the provision would reveal the invalidity of the initial condemnation.

The majority did not even attempt to explain what purpose the amendment could possibly serve under its reading, for the simple reason that none can be imagined. Congress had already vested Amtrak with the normal powers of a District of Columbia corporation (45 U.S.C. § 545(a)), and, prior to the amendment, Amtrak could have transferred rail property that it lawfully possessed if it complied with the regulatory provisions of the Interstate Commerce Act (49 U.S.C. § 11343). Under the majority's reading, therefore, the ISBA is mere surplusage.

Plainly, the majority did not engage in statutory construction but rather statutory nullification. Barring constitutional infirmity, judges are not free to decline to enforce laws that Congress sees fit to enact. That, however, is precisely what the majority has done here. This Court must reverse the judgment below to give effect to an explicit and unequivocal legislative command that the majority impermissibly disregarded.

II. THE ADDITIONAL HOLDINGS OF THE COURT BELOW ARE INSUFFICIENT TO SUPPORT ITS JUDGMENT.

In addition to relying on its erroneous interpretation of § 402(d), the majority set aside the ICC's order and voided Amtrak's condemnation and conveyance to CV on several secondary grounds, none of which is adequate to support its judgment. Specifically, the majority faulted the ICC for failing to make satisfactory findings concerning B&M's claim of impairment and the availability of alternatives to Amtrak. Apparently born of the same underlying hostility toward the Amtrak-CV transaction that led the majority to disregard an unambiguous directive from Congress, these erroneous alternative rationales should not be permitted to stand in the way of Amtrak's valid exercise of its § 402(d) powers.[23]

A. The ICC Properly Considered And Rejected B&M's Claims That Its Ability To Carry Out Its Common Carrier Obligations Would Be Significantly Impaired.

The majority explained that it could not uphold the ICC's order because the agency had provided only a cursory statement in support of its finding that Amtrak's condemnation would not significantly impair B&M's common carrier obligations, and because, in making that determination, the ICC had focused on "post-hoc remedies aimed at ameliorating" the effects of the condemnation, rather than on the conveyance itself. Pet. App. 19a. The majority erred on both counts.

[23] Based on its erroneous interpretation of § 402(d), the majority remanded the case to the ICC for proceedings that could only have resulted in dismissal of Amtrak's application. At a minimum, therefore, the decision below must be reversed so that, in any subsequent proceedings, the ICC may evaluate Amtrak's application free of the majority's impermissibly restrictive interpretation. As the States demonstrate below, however, no remand to the agency is necessary here, inasmuch as the majority's other reasons for invalidating the ICC's order are without merit.

Even if the ICC's findings concerning B&M's impairment claims were not entitled to deference—and plainly they are—the agency's determination that B&M would not suffer impairment of its common carrier obligations was so obviously correct as to be virtually unassailable. B&M itself had allowed its portion of the Conn River Line (upon which its direct competitor, CV, depended) to fall into a state of chronic and dangerous disrepair, and had done so in order to favor the competing line owned by its parent, Guilford.[24] In fact, before Amtrak invoked its eminent domain authority, B&M had slated the line for abandonment. This conduct completely belied B&M's later claim that loss of its fee ownership interest in the line would significantly impair its operations. Moreover, a transaction that left B&M with the right to provide service on the line even after Amtrak and CV had undertaken the rehabilitation and enhanced maintenance efforts that B&M itself refused to undertake plainly *benefitted*, rather than impaired, B&M's operations. Cf. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) (claims of competitive injury cannot be predicated on conduct that benefits competitors).

In any event, the ICC's findings were more than sufficient. B&M raised its claim of impairment in connection with its opposition to *both* Amtrak's condemnation of B&M's lines and CV's companion request that the ICC approve its acquisition of the line.[25] In concluding that the ICC had failed adequately to respond to B&M's competitive concerns, however, the majority simply ignored

[24] See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (1988) (Nat'l Arb. Panel).

[25] CV filed for approval, under expedited regulatory review provisions (see 49 U.S.C. § 10505), of its acquisition of B&M's portion of the Conn River Line and its proposed grant of trackage rights back to B&M over that line. In opposing CV's application, B&M argued that it would "result[] in the gradual loss of B&M's traffic base, reduction of its service, and eventual exit from the market." Pet. App. 83a.

agency findings on CV's companion application that were fully applicable to B&M's § 402(d) impairment claims. Thus, in its decision, the ICC incorporated by reference an earlier, extensive competitive analysis it had conducted of the market in which CV and B&M compete and the rail routes, including the Conn River Line, over which they operate. Pet. App. 83a (citing *Guilford Transp. Indus., Inc.—Control—D&H Ry.*, 366 I.C.C. 396 (1982), *aff'd in part and remanded in part sub nom., Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983)). Among the findings that the Commission adopted as fully applicable to the Amtrak-CV transaction was its prior determination that "the extent to which a rail carrier can exercise control over traffic is greatly diminished in the face of intense motor carrier competition" in the area, and that this competition precluded carriers such as CV from garnering traffic from rail competitors by means other than reduced price and greater efficiency. Pet. App. 83a. Moreover, the ICC found that B&M could continue to serve its existing customers as a result of CV's grant-back of trackage rights, and that B&M would enjoy access to any new shippers on the line by virtue of CV's commitment to provide reciprocal switching. *Id.* at 83a-84a, 90a-91a.

Perhaps recognizing the inherent implausibility of B&M's claim, the majority sought to buttress its conclusion by suggesting that § 402(d) effectively *precludes* the ICC from considering the ameliorating effects of any post-conveyance measures, such as the trackage rights grant to B&M here. *Id.* at 19a. This suggestion, however, is equally insupportable.

The plain language of the statute itself imposes no affirmative limitations on the factors the ICC may consider when determining whether a condemnation will cause significant impairment, nor does its structure and legislative history reveal any congressional intent to so limit the ICC's review. In fact, the statute expressly authorizes the ICC to prescribe the terms and conditions

upon which Amtrak can condemn property. In the absence of compelling evidence to the contrary, a statutory provision that simultaneously grants authority 1) to approve condemnations and 2) to impose conditions on such approval can hardly be presumed to hermetically seal these two administrative functions off from each other.

Indeed, the irrationality of such an approach is demonstrated by this very case. Here, the conveyance to Amtrak was expressly conditioned on the grant of trackage rights to B&M. *Id.* at 91a-92a, 107a. Thus, even if, as the majority insisted, the ICC's finding with respect to impairment must "focus on the 'conveyance of the property to [Amtrak]' and not on post-hoc remedies" (*id.* at 19a), the grant of trackage rights to B&M was not a "post-hoc remed[y]," but an inseparable part of the conveyance itself: without such a grant, no property would have been conveyed.

Even if the majority's construction of subsection (d)(1)(A) were a reasonable one—and the States submit that it plainly is not—the court was not at liberty to substitute its reading of the statute for that rendered by the agency entrusted with its administration. Because the statutory language at issue does not unambiguously preclude the ICC from considering the ameliorating effects of terms and conditions it imposes on Amtrak's condemnation of railroad property, the court was required to defer to the agency's determination that such consideration is permissible. The majority's failure to do so provides no basis for affirming its judgment.

B. The ICC's Finding That Amtrak's Passenger Services Required Transfer Of The Conn River Line From B&M To CV Was The Product Of Reasoned Decisionmaking And Was Supported By Substantial Evidence.

The majority also apparently invalidated the ICC's decision on the ground that the agency failed satisfactorily to explain why Amtrak's needs could not be met through

acquisition of lesser interests in B&M's tracks.[26] Specifically, the majority faulted the ICC for (1) failing to recognize that an easement constituted a lesser interest available under § 402(d); (2) failing to articulate its "responsible owner" response to B&M's "lesser interest" argument in its decision; and (3) failing to explain with sufficient clarity the basis for its assertion that Amtrak had justified acquisition of the line. Pet. App. 20a. It was the majority's misapprehension of the facts of this case, however, rather than any agency departure from principles of administrative decisionmaking, that accounts for the "failures" the majority identified.

In the initial decision instituting proceedings under § 402(d), the ICC observed that "Amtrak has set forth a detailed history of its dealings and negotiations with B&M over the Conn River Line, and of its efforts to maintain passenger service over this line." Pet. App. 130a. Among other facts, the Commission noted that Amtrak had attempted to persuade B&M to upgrade the line, had offered to purchase it, and had instituted arbitration proceedings, all in a vain effort to reinstate *Montrealer* service. *Id.* at 130a & n.11. In its interim decision, the ICC rejected B&M's motion to convert Amtrak's application into one for trackage rights under § 402(a), explaining, in unmistakable terms, that "Amtrak's position clearly is that *only when the subject line belongs to a party other than B&M* will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a (emphasis added). As the States

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[26] Because the majority linked its pronouncements concerning the agency's supposed failure to engage in reasoned decisionmaking with its ruling that § 402(d) prohibited the Amtrak-CV transaction, the decisional import of those pronouncements is unclear. See Pet. App. 21a ("In light of the statutory language limiting Amtrak's condemnation privileges to interests in property that are required for intercity rail passenger service, we find that the Commission's conclusory assertions fail the requirement of reasoned decisionmaking"). The States assume here that the majority meant to establish a separate ground for its decision.

have previously shown, moreover, Amtrak, along with affected states and shippers, offered voluminous evidence in support of this position. See *supra* at 5-9, 24-28.

Hence, by the time of its final decision, the agency had clearly framed the basis for Amtrak's request for relief under § 402(d) and had recited the essential facts underlying that request. It was against this backdrop that the Commission rejected B&M's "lesser interest" argument, stating that "[w]e find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line." Pet. App. 43a. Placed in its proper context, the meaning of this statement, and the facts upon which it was based, were abundantly clear. The ICC was not confused about the availability of easements under § 402(d), nor did it read the words "or interests in property" out of that provision. Rather, it simply concluded that, on the record before it, Amtrak had shown that its passenger services required transfer of the Conn River Line from a patently neglectful B&M to the more responsible CV, and that, accordingly, lesser remedies were inadequate.

Plainly, when read in conjunction with its earlier decisions, the basis for the ICC's final decision was "understandable" (*SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)), and "the agency's path [could] reasonably be discerned." *Motor Vehicles Mfrs. Ass'n.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). No one familiar with the agency's proceedings could have harbored the slightest doubt that the Commission had found that *Montrealer* service required transfer of the Conn River Line to more responsible railroad management, and the court was not "compelled to guess at the theory underlying the agency's action." *SEC* v. *Chenery Corp.*, 332 U.S. at 196-97.[27] The

[27] The majority's suggestion that the ICC's "responsible owner" argument "emerge[d] for the first time on appeal" (Pet. App. 20a), is simply and demonstrably wrong. Far from a post-hoc rationalization, the ICC's acceptance of Amtrak's claims was one of the central underpinnings of its decision.

requirement of reasoned decisionmaking demands nothing more. Certainly, the ICC's decision is not invalid simply because the agency failed to cite to the specific portions of the record supporting its finding that Amtrak had justified acquisition of the line, or because the agency failed explicitly to incorporate by reference its earlier decisions. Nor can there be any dispute that the ICC's critical finding was supported by substantial evidence. These requirements having been met, the agency's decision should have been affirmed.

CONCLUSION

For the foregoing reasons, respondents State of Vermont and Commonwealth of Massachusetts request that this Court reverse the judgment below and remand the case for resolution of the issues that the court of appeals did not reach in its decision.

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DEC 23
OFFICE OF THE

In The

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT BOSTON AND MAINE CORPORATION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the National Rail Passenger Corporation ("Amtrak"), a private for-profit stock corporation, did not have the power, under Section 402(d) of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 562(d), to condemn more property or a greater property interest than is actually "required for interstate rail passenger service."

2. Whether the court of appeals erred in holding that Amtrak had no power to finance its own operations by condemning the private property of one railroad for the purpose of conveying all of that property to a competing railroad which was willing to contract with Amtrak on more favorable terms.

3. Whether the court of appeals erred in holding that the Interstate Commerce Commission had the statutory responsibility for ensuring that Amtrak did not exceed its limited powers under RPSA § 402(d), and that the Commission's construction effectively exempted Amtrak from any effective review of its condemnation actions.

4. Whether the Commission's construction of Amtrak's exercise of condemnation power in this case—which permits one private party to condemn the property of another private party for the express purpose of conveying it to a third private party, with no public administration and with no change in use—violates the Fifth Amendment of the Constitution.

5. Whether the court of appeals erred in holding that even if Amtrak had such powers, the Commission had failed to resolve important factual disputes and failed to make the necessary predicate factual findings required by the statute.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1419, 90-1769

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT BOSTON AND MAINE CORPORATION

Respondent Boston and Maine Corporation respectfully requests that this Court affirm the Court of Appeals for the District of Columbia Circuit's judgment entered on August 10,1990, reported at 911 F.2d 743, and its Order

denying rehearing entered on February 1, 1991, reported at 924 F.2d 427.

STATEMENT[1]

Background

The Connecticut River Line ("Conn River Line") is a rail line running between Springfield, Massachusetts, and White River Junction, Vermont. Prior to this controversy, Boston and Maine Corporation ("Boston & Maine" or "B&M") owned large stretches of the Conn River Line, while Central Vermont Railroad ("Central Vermont" or "CV"), its long-time competitor for freight rail business in New England, owned the remainder. Each had the right to run over the others' rails in accordance with a trackage rights agreement between them dating back to 1930. Pet. App. 9a.

[1] Because of the way the Commission construed the statute involved, it did not find it necessary to make certain findings and resolve many of the critical factual disputes that were presented to it. Also, in some instances, the Commission's preliminary procedural decisions (Pet. App. 119a, 113a, 110a)—aspects of which are reiterated in its final decision (Pet. App. 29a)—contain statements regarding hotly contested issues which were made solely on the basis of references to the petitions for relief filed by Amtrak and Central Vermont. The Commission reached these decisions prior to any hearing or evidentiary proceeding.

Many of the "facts" set forth in the briefs of Petitioners Amtrak and Central Vermont and Respondents State of Vermont and Commonwealth of Massachusetts were not found by the Commission and are disputed. They are referenced to various Verified Statements filed by the parties in the Commission proceedings. While there are many facts that are not in dispute, there are numerous important factual issues that were not resolved by the Commission. These will be discussed in the Argument, *infra*. However, in order to place the factual background in proper perspective, Respondent Boston & Maine may refer to Verified Statements and materials submitted to the Commission, which, as in the case of Petitioners Amtrak and Central Vermont and Respondents State of Vermont and Commonwealth of Massachusetts, did not make their way into Commission findings.

At White River Junction, Vermont, the Conn River Line connects with that of the Canadian National Railway Company ("CN"), which continues on to Montreal, Quebec. At Wells River, Vermont, the Conn River Line connects with Canadian Pacific ("CP"), whose lines proceed north and into eastern Canada. The Conn River Line is an integral part of a larger line linking both Canadian rail systems (CN and CP) to U.S. rail carriers in the Northeast. J.A. 63-64; Pet. App. 9a. CN is the parent company of Central Vermont, and the chief competitor of CP.

In 1982, the Interstate Commerce Commission (the "ICC" or the "Commission") approved the acquisition of Boston & Maine out of bankruptcy reorganization by Guilford Transportation Industries, Inc., owner of the Maine Central Railroad. *See Guilford Transp. Indus., Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 294 (1982), *aff'd in part and rev'd in part sub nom. Lamoille Vally R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983).[2]

The Dispute With Amtrak

In 1972, Amtrak began using the Conn River Line to provide a passenger train (the "Montrealer") between Montreal and Washington, D.C. Sometime in 1986, Amtrak became concerned about the speeds—sufficient for Boston & Maine's freight traffic—that the track condition required of Amtrak's passenger trains. J.A. 103. Boston & Maine deemed speeds of 25 miles per hour or less as sufficient for its freight operation, but Amtrak demanded that Boston & Maine maintain the track to a degree sufficient to allow passenger trains to operate at speeds of up to 60 miles per hour. Pet. App. 9a. The difference in maintenance costs between these two speeds was approximately $400,000 per year. Pet. App. 10a.

[2] CV tried to block the acquisition of B&M out of bankruptcy, an attempt that was rejected by the Commission, whose decision was affirmed by the D.C. Circuit. *See Central Vermont Ry. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

In the fall of 1986 and spring of 1987, Amtrak and B&M representatives were involved in ongoing discussions concerning the upgrading of the Conn River Line and the desirability of seeking an appropriation of federal funds to underwrite the cost of the necessary work. J.A. 103. About that time, Amtrak and B&M became involved in a dispute over the responsibility for the cost of upgrading the tracks. J.A. 107-08. B&M took the position that it would cooperate in the project to upgrade the tracks provided that Amtrak agreed to pay its share of the costs associated with maintaining tracks suitable for fast passenger trains. J.A. 107.

In April 1987, flooding of the Connecticut River caused B&M to suspend all service on the Conn River Line for several days. J.A. 104. When the flood waters subsided, B&M resumed its freight operations over the Conn River Line and authorized the resumption of passenger service. *Id.* Amtrak abruptly decided that it would no longer operate the Montrealer. Amtrak contended that it had stopped running the Montrealer due to the allegedly poor condition of Conn River Line although the condition of the track was the same after the flooding as it had been before the flooding. *Id.*[3]

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[3] Amtrak instituted an arbitration proceeding on April 24, 1987, under a trackage rights agreement that had been entered into with the trustee in bankruptcy during the reorganization proceedings. B&M contended that the agreement had been terminated. The Arbitration Panel initially determined that the trackage rights agreement continued in existence until August 4, 1987, and that B&M had not used its "best" efforts to maintain the tracks in accordance with the trackage rights agreement but awarded no relief to Amtrak. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, NAP Cases Nos. 72 & 74, Opinion and Order (Nat'l Arb. Panel Nov. 7, 1988).

The arbitration proceedings were held in abeyance during the course of the Commission proceedings, involved herein, and during the appeal to the court of appeals. Ultimately, they were resumed with respect to the segment of the Conn River Line owned by B&M and not part of the condemnation proceedings. On March 9, 1990, the Arbitration Panel ruled that if Amtrak desired to use the B&M southern segment

In July 1987, Congress appropriated $5 million for the rehabilitation of two B&M segments of the Conn River Line from Springfield, Massachusetts, through Vermont. The funds were designated "only for construction, rehabilitation, renewal, replacement, or other improvements deemed by [Amtrak] to be needed to enable it to restore railroad passenger service between Springfield, Massachusetts and Montreal, Canada through Vermont." Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447. B&M was the owner of the line at the time Congress made the appropriation.

The Amtrak–Central Vermont Agreements

At some unknown point in time in 1987, Amtrak began negotiations with Central Vermont. By September 1987—a full six months before Amtrak filed the condemnation petition at issue in this proceeding—Amtrak and CV had retained consultants to appraise the B&M portion of the

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it would have to contribute to B&M the $1.8 million out of the $5 million appropriated by Congress for the upgrade and maintenance of the line. The panel also ruled that, since the prior trackage rights agreement had terminated, Amtrak would have to apply to the Commission under Section 402(a) for authority to use B&M's tracks and on such terms and for such compensation as the Commission may fix as just and reasonable. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, NAP Cases Nos. 72 & 74, Further Opinion and Order (Nat'l Arb. Panel March 9, 1990).

During the course of the arbitration proceeding, and while B&M was contending that the 1977 trackage rights agreement had been terminated, B&M amended its System Diagram Map to include the Conn River Line in the category of track anticipated to be the subject of an abandonment or discontinuance petition within the next three years. Pet. App. 122a. When Amtrak instituted the condemnation proceeding, B&M removed the Conn River Line from such designation. *Id.* "Designation" of a rail line for abandonment on a system diagram map filed with the Commission is merely a notification that a line *may* be abandoned at some point in the future. *See* 49 C.F.R. § 1152.10 (1990). Nothing happens, however, until a carrier applies to the Commission to begin an abandonment proceeding. *See id.*, §§ 1152.20-1152.50. No abandonment proceeding was ever begun by Boston & Maine.

Conn River Line. *See* Deferred Appendix, *Boston & Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990), at 803 (Rebuttal Testamony of Walter R. Ernst); *id.* at 1149-50 (Verified Statement of James Thetford). By early January 1988, the negotiations between Amtrak and Central Vermont had reached an agreement in principle which is recorded in an internal Central Vermont memorandum written by Gerald Maas (the president of CV's parent company), dated January 6, 1988. The memorandum outlines the Agreement:

> After exploring a wide range of proposals with Amtrak and the State of Vermont we have decided on a plan to initiate a proceeding in which Amtrak will condemn certain Guilford [*i.e.*, B&M] interests in the line and subsequently assign those interests to CV for purposes of upgrading and operating the line.

J.A. 92. The internal memorandum noted that "Amtrak does not want to own or operate the Line, and has no funds to acquire it," so that the amount of funds necessary would have to come from someone else. J.A. 93. CV anticipated getting the portion of the $5 million that Congress had appropriated for track improvements on the B&M segments. *Id.*

The memorandum outlines the procedures that would be followed in order for CV to gain control of the B&M segments of the Conn River Line. Amtrak was to make a take-it-or-leave-it, $1 million offer, with the money to be provided for that purpose by CV. J.A. 94. "If the offer is not accepted within a specified period (and we have reason to believe Guilford will not accept it), it will be withdrawn." *Id.* Amtrak would then condemn the property and turn the whole line over to CV. J.A. 92.

In furtherance of this scheme, Amtrak sent a letter to B&M, dated March 18, 1988, offering to buy the segment (and associated properties) for $1 million, and stating that

it intended to transfer ownership of the line to CV. J.A. 55-58. The letter stated bluntly:

> If you do not accept Amtrak's offer by executing a binding letter of intent by April 1, 1988, Amtrak will have to consider that it is unable to reach agreement with Guilford or B&M on the terms of the sale of property required for intercity rail passenger service. Pursuant to Section 402(d), Amtrak will then apply to the Interstate Commerce Commission for an order requiring conveyance of the property to Amtrak.

J.A. 57.

B&M's chairman, in reply, noted that "virtually no realistic negotiations or discussions have been engaged in by Amtrak since it unilaterally and abruptly decided to cease its operation of the Montrealer." J.A. 60. The chairman stated that he was "willing to enter into negotiations promptly regarding the terms of compensation to be paid by Amtrak to operate the Montrealer over the property of B&M," but that he expected "both parties [to] enter those negotiations in good faith." J.A. 59. He stated that "if for any reason Amtrak and B&M are unable to agree upon the amounts or apportionment of the additional expenses resulting from Amtrak's operation of the line, I am willing to permit a third party, such as the Interstate Commerce Commission, to establish the proper level of compensation." J.A. 59-60. In light of that, he wrote "it appears clear that there is no need to pursue the very complex 'offer to purchase' set forth in your letter." J.A. 60. With respect to the offer itself, however, he wrote:

> Generally, however, you should be aware that the terms set forth in your letter raise several troubling issues, including, without limitation, the

> gross insufficiency of compensation, lack of specificity, excessive breadth and unnecessarily severe anti-competitive impact of the seizure, as well as the failure of the unilateral "take it or leave it" offer to satisfy the requirement of realistic, good faith negotiations prior to seizing our private property for the benefit of our direct competitor.

Id.

In response to the letter from B&M, Amtrak on March 30, 1988, wrote that if the initial offer were not accepted by April 1, it would proceed with the condemnation application. J.A. 62. Boston & Maine did not accept the offer and Amtrak filed an application before the Commission on the next business day, April 4, 1988.

Proceedings Before the Commission

Amtrak petitioned the Commission to institute a proceeding under Section 402(d) of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. 562(d) (1988), requesting an order that the Conn River Line and certain other property and contract interests of B&M be conveyed to it and that the Commission establish the terms for the sale of the Line. Pet. App. 119a-20a. In response, B&M asked the Commission to reject the application. Pet. App. 120a. On April 7, 1988, Central Vermont filed a petition with the Commission for exemption to acquire Amtrak's interests in the Line once Amtrak obtained those interests. *Id.*

On April 26, 1988, acting solely on the basis of the initial applications and responses filed by the parties, the Commission denied B&M's request to reject the application and consolidated the Central Vermont petition with Amtrak's petition. *Id.* In its April 26, 1988 order, the Commission quoted and paraphrased extensively from Amtrak's application. The Commission, in the same stroke of its pen,

"instituted," Pet. App. 133a, a proceeding to condemn the B&M segment of the Conn River Line and stated:

> Nothing in this record provides any indication that Amtrak and B&M will ever reach agreement on terms of a sale. Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under section 402(d).

Pet. App. 131a.

On April 22, 1988, prior to the Commission's order instituting the proceeding, B&M petitioned the Commission to convert Amtrak's application under Section 402(d) to an application under Section 402(a) of RPSA. Pet. App 114a. B&M's petition pointed out that it was willing to enter into an agreement with Amtrak on reasonable terms and conditions, that it had attempted to negotiate in good faith with Amtrak and reach an agreement, but the primary obstacle has been divergent views regarding responsibility for sharing the additional costs to maintain the line to the level Amtrak desired, and that B&M was willing to have the Commission determine the amount of, and responsibility for, such additional costs. Pet. App. 114a-115a.

On May 19, 1988, the Commission denied B&M's Petition to Convert. Pet. App. 115a. In its decision, the Commission stated, again without taking evidence or conducting a hearing, that:

> Under sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. . . . Here, Amtrak has made an election of remedies by filing its application under Section 402(d) for conveyance of the subject line, and has done so deliberately. . . . Amtrak has not requested the

> Commission to consider alternative remedies in this case. . . . Amtrak has met the statutory criteria . . . [and] is plainly entitled under the statute to a decision on the requested conveyance of the line.

Pet. App. 115a-16a.

Thereafter, the parties engaged in discovery and filed submissions with the Commission, largely directed to the issue of just compensation. On August 4, 1988, the Commission issued its decision (the "Final Decision") ordering the conveyance, establishing just compensation, imposing terms and conditions on the transaction, and granting Central Vermont's petition to acquire Amtrak's interests. Pet. App. 29a. Just compensation was determined by the Commission to be $2,373,286. Pet. App. 105a. Chairman Gradison strongly dissented from the Final Decision. Pet App. 95a. Vice Chairman Andre had previously dissented, stating that Amtrak's requirements could be satisfied by acquisition of a lesser interest. Pet. App. 111a.

Following the Commission's Final Decision, the Conn River Line was acquired by Amtrak, reconveyed to Central Vermont, and $3.2 million of the $5 million appropriated by Congress was expended to rehabilitate the line. NAP Cases Nos. 72 and 74, Further Opinion and Order (Nat'l Arb. Panel March 9, 1990). Amtrak resumed operation of the Montrealter over the northern segment of the Conn River Line, but in other respects over a different route which now adds almost two hours traveling time between New Haven and Brattleboro, Vermont, and no longer serves the major New England cities of Hartford, Connecticut and Springfield, Massachusetts. *Id.*

The Court of Appeals Decision

On petition for review by Boston & Maine, the Court of Appeals for the District of Columbia Circuit reversed and remanded for further proceedings. The court held that

the Commission failed to make the necessary findings and determinations under RPSA and that the Commission's construction of RPSA is contrary to its plain meaning. Pet. App. 5a. The court pointed out the Commission's construction of the phrase "required for intercity rail passenger service" contravenes the plain meaning of Section 402(d) as it allows the taking of property that was neither needed nor wanted by Amtrak. Pet. App. 18a-20a. The court recognized that while use of the Conn River Line was needed for the Montrealer service, Amtrak did not have to condemn the entire fee interest in order to provide that service. "Rather, what it required, and what in fact was all it sought in substance if not in form, was not title to the B&M segment but its use in a condition permitting resumption of the Montrealer service." Pet. App. 18a. The court of appeals found that, by failing to consider whether an easement or lesser interest would satisfy Amtrak's requirements, the Commission "reads the words 'interest in property' out of the statute." Pet. App. 20a. The court noted that Amtrak could have commandeered the use required under Section 402(a), and further, that Amtrak could have invoked Section 402(d) to secure an easement together with the right to improve and maintain the easement consistent with the granted use. Pet. App. 18a-19a.

Although Judge Ruth Ginsburg did not agree with certain aspects of the court's construction of RPSA, she also found that the Commission had made "no independent effort to ascertain whether the B&M-CV conveyance was in fact required to meet Amtrak's passenger service obligations." Pet. App. 27a. Because the Commission had disavowed before the court of appeals "any doubt as to B&M's competence to maintain the track in question," the Commission "shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by section 402(d) of the RPSA." *Id.*

Petitioners sought rehearing from the court of appeals and, while the petition was pending, Congress enacted the

Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654 (to be codified at 45 U.S.C. § 562(d)) (the "1990 Amendment"). Section 9(a) of the 1990 Amendment provides that in the case of a condemnation under Section 402(d)(1) of RPSA, Amtrak may subsequently convey to a third party title or other interest in the property condemned, if such reconveyance is found by the Commission to further the purposes of RPSA. 104 Stat. at 4658.

The 1990 Amendment was brought to the attention of the court of appeals which, after consideration, denied rehearing in a *per curiam* opinion. Pet. App. 1a-3a. The court held that the 1990 Amendment "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a. The court found that while the new language plainly authorizes Amtrak to convey property subsequent to a condemnation that is otherwise valid under RPSA Section 402(d)(1), it does not affect the requirement under the statute that Amtrak's use of its eminent domain power must be justified in the first instance. Pet. App. 3a.

Judge Ruth Ginsburg adhered to her views and, in the face of the 1990 Amendment, stated:

> I remain of the view, however, that the Commission *itself* has not yet stated, with supporting findings, that the picture of an intransigent Boston and Maine Railroad drawn by Amtrak is in fact accurate.

Pet. App. 4a (emphasis in original).

SUMMARY OF ARGUMENT

At issue in this case is whether Amtrak—a private, for-profit stock corporation—can condemn another railroad's interest in property that Amtrak does not require for the

provision of intercity rail passenger service, and convey that interest to another railroad as a means of financing Amtrak's operations. The court of appeals, after careful review of the statutory scheme, concluded that this transaction was beyond the scope of the limited condemnation authority that Congress granted to Amtrak. It also held that, in any event, the Commission had failed to make the findings required by the statute or to exercise any meaningful review of Amtrak's actions. The court of appeals' conclusions are correct and should be affirmed.

A. Amtrak has not been granted the authority to take interests in property greater than those actually required for intercity rail passenger service. Nor has it been granted the unfettered discretion to dictate the terms on which it will do business with others. The Commission's contrary construction is not entitled to any deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

1. The Rail Passenger Service Act ("RPSA") is not ambiguous. Section 402(a) permits Amtrak to obtain precisely what it ultimately obtained in this case: the use of the Conn River Line in a condition suitable for intercity rail passenger service. The condemnation authority in Section 402(d) applies not to use of property, but to *acquisitions* of property. Section 402(d) limits Amtrak to only those property interests *required* for intercity rail passenger service. Far from providing Amtrak with a menu of "alternative remedies" that it can choose at will, RPSA creates a system of carefully constructed powers and limitations within which Amtrak must operate.

2. Even if the statute were ambiguous, the Commission's construction is not a permissible reading of it. The Commission's construction effectively renders Section 402(a) of RPSA a nullity, because Amtrak can evade Section 402(a)'s restrictions by "condemning" the use of tracks and provision of services under Section 402(d). It also ren-

ders parts of Section 402(d) either meaningless or redundant. It conflicts with the congressional policy of avoiding cross-subsidization of passenger service by freight service. It ignores the legislative history of Section 402(d), which makes clear that Congress intended to give Amtrak only *limited* eminent domain authority. And it ignores the settled principle that delegations of eminent domain authority to private entities must be construed narrowly. Here, the Commission has effectively given Amtrak a power—the authority to reorganize rail ownership to give lines to "better" owners—that even the Commission cannot exercise.

3. The 1990 Amendment to RPSA does not alter the fact that Amtrak is limited to taking only those property interests *required* for intercity rail passenger service. Neither the plain language of the 1990 Amendment, nor its abbreviated history, supports the contention that Congress intended to grant Amtrak the authority to take more property than is actually required, or intended to alter the structure of RPSA.

B. If RPSA were to be construed in such a way as to permit what happened here, it would violate the public use requirement of the Fifth Amendment. The net result of this proceeding is that B&M's entire interest in this property has been transferred to another private railroad, Central Vermont. The line is being used for precisely the same purpose: the common carriage of freight and passengers. There is neither any change in use, nor any public administration. Thus, the transaction is nothing more than the condemnation of private property for private benefit, and is unconstitutional.

C. In any event, even if Amtrak had the power it claims, the Commission failed to make the findings that are a necessary predicate to condemnation under Section 402(d). The Commission made no effort to determine whether, in fact, the interest Amtrak took was "required for intercity rail passenger service." It declined to consider whether

any lesser interest would satisfy Amtrak's actual needs. It concluded that the parties were, in fact, "unable to agree" solely on the basis of Amtrak's assertions in its pleadings *before* the Commission conducted any evidentiary proceeding. It failed to deal with any of B&M's evidence regarding the impairment it would suffer from the forced conveyance. The Commission, by simply deferring to Amtrak's conclusions on each of these issues, abdicated its responsibility to make reasoned findings and its order is therefore fatally flawed.

ARGUMENT

I. AMTRAK DOES NOT HAVE THE AUTHORITY TO TAKE A PROPERTY INTEREST OF A RAILROAD THAT IS NOT REQUIRED FOR INTERCITY RAIL PASSENGER SERVICE

The issue in this case is not "whether Amtrak may condemn railroad property that it intends to reconvey to another carrier," Vermont Br. 15, but whether Amtrak can, as a method of financing its operations, condemn a particular property interest that is not "required for intercity rail passenger service." Under RPSA, Amtrak has no power to take a property interest greater than that "required for intercity rail passenger service." Yet the various Petitioners[4] consistently miss this point. The problem with the Commission's action is, as the court of appeals found, that Amtrak has never demonstrated that the fee

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[4] Briefs on the merits were filed by petitioners Amtrak and Central Vermont (No. 90-1419) and by petitioners Interstate Commerce Commission and United States (No. 90-1769). A brief in support of Petitioners was filed by Respondents State of Vermont and Commonwealth of Massachusetts. The Vermont/Massachusetts brief largely parallels the Petitioners' briefs. For convenience, we may refer to all these parties jointly as "Petitioners" or, when appropriate, as "Amtrak," "ICC" or "Vermont".

interest in the Boston & Maine line was, in fact, *required* for intercity rail passenger service. It is undisputed that what Amtrak "needed" in this case was "not title to the B&M segment but its use in a condition permitting resumption of the Montrealer service." Pet. App. 18a. What it took, however, was Boston & Maine's entire interest in the property.

Section 402(d) of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 562(d) (1988), is one piece of a larger statutory scheme that not only created Amtrak but also governs the nation's rail system as a whole. That framework, developed over many years, has been carefully crafted to balance public interests with the very real interests of private railroads.

Petitioners do not argue that the statute specifically authorizes what occurred here. On the contrary, they claim that the statute is "ambiguous" and that this Court must therefore defer to the Commission's construction under the doctrine of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But the Commission's construction does serious violence to the language, history, and policy objectives of the statute, and ignores the settled rule that delegations of eminent domain authority to private entities must be narrowly construed. The Commission's interpretation of the statute is so arbitrary and erroneous that it is entitled to no deference.

A. The Commission's Construction Of Section 402(d) Is Not Entitled To Deference.

The Commission's interpretation is entitled to consideration only if the statute is ambiguous on the issue before the Court and the Commission has made a "permissible" reading of the statute. *Chevron*, 467 U.S. at 842-43. However, Section 402(d), when read in conjunction with the remainder of RPSA, is not ambiguous, and the Commission erred in failing to give effect to its language and purpose. Even if the statute were ambiguous, however, the Commission's construction—which is not accompanied by any detailed explanation of its reasoning—nullifies many parts of the statute and creates conflicts between various provisions. The Commission's construction is not a rational reading of the statute.

1. The Statute Is Not Ambiguous.

The RPSA statutory scheme is straightforward. Each provision, and each phrase, has a distinct meaning that must be given effect.

Railroads generally possess the power to acquire property by eminent domain, through grants of authority from the various states. *See, e.g., United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 569-70 (1898); *see generally* 1A Julius L. Sackman, *Nichols' The Law of Eminent Domain* § 3.231 at 3-228 (rev. 3d ed. 1973) (hereinafter *Nichols On Eminent Domain*) ("Railroad corporations which are created pursuant to the authority of general laws are possessed of all the powers of eminent domain which are granted by such general laws.") (footnote omitted). When Congress created Amtrak, the new company had no specific eminent domain authority. Congress, however, gave Amtrak the special right to run its passenger trains over any rail line in the United States. Section 402(a) of RPSA provides:

> The Corporation may contract with railroads or with regional transportation agencies for the *use of tracks and other facilities and the provision of services* on such terms and conditions as the parties may agree.

45 U.S.C. § 562(a)(1) (emphasis added). If Amtrak cannot obtain a voluntary agreement with another railroad, the statute allows Amtrak to petition the Commission for an order compelling the other railroad to grant it such "use of tracks and other facilities." If the Commission finds that the order would further the purposes of RPSA, it

can order the provision of services on such terms and for such compensation that it considers just and reasonable. *Id.* Under the statute, the other carrier is entitled to be paid for its services; compensation can be higher than the "incremental cost" to the carrier—*i.e.*, the additional cost the carrier incurs to provide the services Amtrak wants—based on "quality of service." *Id.* The statute also requires Amtrak to make its own lines available to other railroads, and in the event of a failure to agree the Commission again is required to set the proper level of compensation. *Id.* § 562(a)(2). In making such determinations, the Commission "shall not permit cross subsidization between intercity rail passenger service and rail freight services." *Id.*

In 1973, Congress amended RPSA to give Amtrak a general power of eminent domain over property "except right-of-way, land, or other property of a railroad" or a State, municipality, or government agency. RPSA § 305(d), 45 U.S.C. § 545(d) (1988). At the same time, Congress gave Amtrak the power, under certain circumstances, to take property of other railroads.[5] The statute, in its present form, allows Amtrak to condemn "property (including interests in property)" owned by a railroad *if* Amtrak is (1) "unable to agree" with the owner upon terms for the sale, and (2) the property is "required for intercity rail passenger service." 45 U.S.C. § 562(d)(1). It is thus a necessary condition of Amtrak's exercise of authority that the specific piece of property it takes be "required for intercity rail passenger service."

If these two conditions are met, Amtrak can petition the Commission for "an order establishing the need of the

[5] This gave Amtrak, a corporation created by Congress, a right to condemn property that is generally equivalent to that of other private railroads, a fact noted in the accompanying Senate Report. *See* S. Rep. No. 226, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327.

Corporation for the property at issue" and compelling conveyance of the property to Amtrak. *Id.* That "need," under the statute, is to be considered "established" unless the Commission finds both that the conveyance would significantly impair the present owner's "ability . . . to carry out its obligations as a common carrier," and that Amtrak's need can be met by acquiring "alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation" or can be condemned from a non-railroad under Section 305(d). *Id.* Amtrak has the power to convey subsequently the property it has taken pursuant to Section 402(d). *Id.*

This statutory scheme is simple, logical, and clear. Every provision plays its part in the overall structure. Section 402(a) applies when Amtrak needs the "use of tracks and other facilities" or "the provision of services" by another railroad, the type of arrangement usually called "trackage rights." The terms of that section make it clear that the other railroad is not required to pay for whatever Amtrak needs; Amtrak must bear at least the "incremental costs" of the service.

If Amtrak, however, requires something more than trackage rights or service agreements—if it requires "property (including interests in property)"—it can proceed by eminent domain before the Commission. If the property is not owned by a railroad, Amtrak can condemn it under Section 305(d). If the property is owned by a railroad, Amtrak must proceed under Section 402(d), which governs *acquisition* of "property (including interests in property)" as opposed to *use* of "tracks and other facilities."

Under Section 402(d), Amtrak can apply for relief *if* it can demonstrate two criteria. First, the particular "property" or "interests in property" it seeks to take must be "required for intercity rail passenger service." Congress was clear on this point. It did *not* say "property that would benefit Amtrak," or "property to be used by Amtrak" or

"property that can be sold to someone else to finance Amtrak's operations," or anything like that. It said plainly that the "property" or "interest in property" that Amtrak seeks must, itself, be "required" for the provision of intercity rail passenger service. This does not mean that Amtrak must demonstrate that no other piece of property could meet its needs—*e.g.*, that there is no other rail line that could be used to carry passengers to Montreal—but simply that the particular property interest that Amtrak takes must be *required* for intercity rail passenger service.

Second, Amtrak must demonstrate that the parties were "unable to agree" on the terms of a sale. Congress could have provided that Amtrak could take property whenever it chose, but instead specifically provided that Section 402(d) was available only if the parties were "unable" to agree. The use of the term "unable" in Section 402(d) clearly requires some substantial, good faith efforts at negotiation before the section can be invoked.[6]

If Amtrak establishes that the particular property interest it seeks is "required," and that it has been unable to agree with the owner on a sale, it is entitled to condemn the property *unless* two criteria are met. First, the Commission must examine whether the conveyance would "sig-

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[6] Lower courts have consistently held that when a statutory condemnation power is conditioned on the inability of the condemnor and the condemnee to agree on terms for a voluntary sale of the property, there must be a *bona fide* effort on the part of the condemnor to acquire the property by negotiation with the condemnee before the condemnation power may be exercised. *See, e.g., Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) (statute conditioned taking on inability of condemnor to acquire the property by contract or to agree with the owner as to the price to be paid); *cf. Wilson v. Union Elec. Light & Power Co.*, 59 F.2d 580, 581 (8th Cir. 1932) (statute conditioned exercise of eminent domain power on inability to acquire property by contract); *Kerr v. Raney*, 305 F. Supp. 1152, 1154 (W.D. Ark. 1969) (statute subjected exercise of eminent domain power to condition that property cannot be obtained by purchase).

nificantly impair the ability of the railroad to carry out its obligations as a common carrier." If not, Amtrak can take the property. If the conveyance would impair the railroad's operations, however, the Commission must determine whether Amtrak's obligations can be met by "acquisition of *alternative* property (including interests in property)" (emphasis added) that may be for sale or can be condemned from a non-railroad. If there is some other rail line or piece of property that would satisfy Amtrak's needs, the conveyance cannot be compelled. If not, Amtrak's need is established and the conveyance may be approved by the Commission.

There is nothing ambiguous about this. Congress used the phrase "use of tracks and other facilities and the provision of services" in Section 402(a). It used a very different phrase—"property (including interests in property)"—in Section 402(d).[7] Where Congress uses different terms in the same statute, it is presumed that they mean different things. *E.g., United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1186 (6th Cir. 1982) ("Ordinarily, the use of different language creates an inference that Congress meant different things."), *aff'd*, 464 U.S. 165 (1984); *Lankford v. Law Enforcement Assistance Admin.*, 620 F.2d 35, 36 (4th Cir. 1980) ("clear use of different terminology within a body of legislation is evidence of an intentional differentiation"). Here, "services" means *services*; "use" means *use*; "property" means *property*.

Under this statutory framework, Amtrak is not authorized to condemn any more property or any larger interest in property than is *required* for intercity rail passenger service. This does not mean that Amtrak must necessarily

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[7] Nor did Congress use the phrase "service problems" in Section 402(d) or its legislative history, contrary to the Commission's reading of the statute. Pet. App. 39a; Amtrak Br. 20. The means for Amtrak to obtain *services* from another railroad is expressly provided for in Section 402(a).

keep ownership of the property it takes. If Amtrak, for example, needed an easement to allow maintenance personnel to maintain tracks to its specifications, it is not prohibited from transferring title to that easement to a third party for the provision of such services.[8] Similarly, there may be circumstances where Amtrak cannot avoid taking more than is absolutely required, for example, if it has to take a large building and raze it to build a smaller structure.

Under the statute, the question is not who will ultimately own the property but how much property does Amtrak *require*.[9] Amtrak cannot condemn an easement where a trackage rights agreement is sufficient.[10] It cannot condemn an entire fee interest when an easement will do. It certainly cannot condemn an entire fee interest in property merely because it believes that it would be more beneficial to contract with a different owner.

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[8] Thus, if the Commission were actually to determine that rehabilitation by someone other than B&M was *required* for the provision of intercity rail passenger service—something the Commission never found and which it specifically disavowed in argument before the Court of Appeals, *see* Pet. App. 27a—it could approve the conveyance of an easement or similar interest that would permit Amtrak (or its designee) to rehabilitate and maintain the line. The balance of the ownership interest—including the right to control its use by other freight railroads—would have remained with B&M. This alternative was suggested by Vice Chairman Andre in his dissent. Pet. App. 111a.

[9] The transfer of private property to a private owner for the same use raises constitutional problems, however, which are discussed in part II, *infra*.

[10] A trackage rights agreement might not be sufficient, for example, if the tracks were going to be torn up, because Amtrak could be left with nothing but a breach-of-contract action against the other railroad. The only other time Section 402(d) has been invoked involved precisely that situation. *See National R.R. Passenger Corp.—Conveyance of Conrail Line in Wayne Cy., MI*, Finance Docket No. 30898, 1986 ICC LEXIS 132 (Sept. 29, 1986). The matter was ultimately settled. *See Conrail Abandonment in Wayne Cy., MI*, Docket No. AB-167 (Sub-No. 947N), 1987 ICC LEXIS 459 (Jan. 28, 1987).

There is nothing ambiguous about this statute, and thus no basis for any deference to the Commission's construction.

2. The Commission's Construction Of Section 402(d) Is Not A Permissible Reading Of The Statute.

Amtrak has twisted this simple framework into what the Commission described to the court of appeals as an "imaginative financing device," Pet. App. 15a, in which Amtrak pays for its operations by condemning property it does not need and selling it to the condemnee's competitors. Even if there were some doubt as to the meaning of the statute, the Commission's construction turns it into nonsense.

a. The Commission's Construction Is A Strained Reading Of Plain Language.

The Commission found that the various interconnected provisions of RPSA simply provided Amtrak with an "election of remedies" that Amtrak could invoke at its discretion. Pet. App. 39a. The Commission held that it was compelled to find that the "property" was "required for intercity rail passenger service" because Boston & Maine had not demonstrated both that the conveyance would impair B&M's common carrier obligations and that there was alternative property available for sale. Pet. App. 45a-46a.[11]

According to the Commission, a "no" answer under either Section 402(d)(1)(A) or 402(d)(1)(B) means that Amtrak must be allowed to take the property. Thus, so long as the conveyance does not "significantly impair" the other railroad's common carrier obligations (the Section

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[11] As Petitioners put it, because Section 402(a) is not cross-referenced in Section 402(d), it simply "is not among the limitations on Amtrak's condemnation authority that the statute specifies." ICC Br. 13.

402(d)(1)(A) test), the Commission considers that Amtrak is entitled to any property it chooses.[12]

The Commission's interpretation must therefore be that the phrase "property required for intercity rail passenger service" means nothing more than "any property whose conveyance would not significantly impair the common carrier obligations of another railroad." This tortures the statutory language beyond endurance. It renders the phrase "required for intercity rail passenger service" either meaningless or utterly redundant.

The plain error in the Commission's construction is evident. Even if the Commission found as a matter of fact that the parties were *not* unable to agree and that Amtrak had *no* intention of using the property for intercity rail passenger service, it would still, under its construction, have to approve the condemnation as long as Amtrak offered trackage rights and just compensation to the condemnee. This stretch of the language verges on the absurd.

Similarly, the Commission completely ignores the differences in the language of Sections 402(a) and 402(d). The net effect on Amtrak of the Conn River Line condemnation under Section 402(d) is that Amtrak has obtained trackage rights on the line from Central Vermont, precisely the same sort of rights it could have obtained from Boston & Maine under Section 402(a). If the "use of tracks" is an interest that can be acquired under Section

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[12] The Commission then concludes that a conveyance will not "significantly impair" the other railroad's obligations if the other railroad receives "just compensation" and is permitted to buy trackage rights from the new owner. Pet. App. 46a. This reasoning is circular. The statute requires payment of "just compensation" whenever property is taken. Under the Commission's construction, property can be taken when it does not "impair" the common carrier obligations of another carrier (or even when it does, if alternative property is not available for sale). The Commission, however, uses the payment of just compensation itself as evidence that there is no impairment.

402(d), then Section 402(a) is a nullity. Moreover, by using Section 402(d) to obtain trackage rights, Amtrak evades the specific limitations on trackage rights agreements that Congress put in Section 402(a)—specifically, the requirement that Amtrak pay its own way. The choice between Amtrak's Section 402(a) and 402(d) powers does not, as Amtrak contends, belong to Amtrak, Amtrak Br. 19, but depends on the needs of Amtrak as determined by the Commission.

Petitioners' claim that the court of appeals' decision "strips Amtrak of an important remedy for securing fair arrangements with the freight railroads," ICC Br. 13, is therefore wrong.[13] Section 402(a) expressly provides a mechanism for such "fair arrangements" and appoints the *Commission*, not Amtrak, as the arbiter of what is "fair." What the court of appeals' decision removes is the threat that Amtrak can coerce other railroads into agreeing to *unfair* arrangements under threat of having their lines or property turned over to their competitors. No such expansion of Section 402(d) is necessary to ensure that Amtrak pays a fair price for the tracks and services it needs.[14]

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[13] The characterization of Section 402(d) as an "important remedy" may be questioned when it has been invoked only twice in 18 years and when the Commission itself characterized this case as "an extraordinary proceeding." Pet. App. 39a.

[14] Nor can the statute be read, as urged by Vermont, as granting Amtrak "broad . . . remedial authority." Vermont Br. 13. Nothing in the statute or its legislative history (*see infra*, Section 1.A.2.c.), supports Vermont's contention that the statute permits Amtrak to punish a "willfully neglectful owner," Vermont Br. 13, by transferring its property to a "more responsible carrier." *Id.* at 17. The court of appeals properly noted that the Commission made no such finding. Pet. App. 20a. Clearly, Section 402(a) was designed to offer Amtrak the means to obtain an order from the Commission for "the provision of services or the use of tracks or facilities of the railroad." 45 U.S.C. § 562(d).

b. The Commission's Construction Is At Variance With Its Own And With Congressional Policies.

One of the fundamental policies behind RPSA is Congress's determination to eradicate cross-subsidies between railroads, whether passenger, commuter, or freight. Section 402(a) itself requires Amtrak, when it uses the facilities of others, to pay its fair share, which is at least the incremental costs of service. That policy is carried out consistently through the statutes.[15] The D.C. Circuit recently noted, after evaluating congressional actions with respect to rail policy, that the legislation of the 1970s and 1980s shifted national policy "from acceptance of notions of collective railroad responsibility and cross-subsidization among carriers to congressional disapproval of those same

[15] *See, e.g.*, 45 U.S.C. § 562(a)(2) (1988) (in considering just compensation for use of Amtrak facilities by other railroads, Commission "shall not permit cross subsidization between intercity rail passenger service and rail freight services"); *id.* § 851(a)(6) (1988) ("cross subsidization among intercity, commuter, or rail freight services is prohibited" in agreements for trackage rights over rights-of-way in the Northeast Corridor). The Commission has also consistently opposed, on policy grounds, cross-subsidization between profitable and unprofitable services. *See, e.g., Burlington Northern, Inc.—Control Merger—St. Louis-San Francisco Ry.*, 360 I.C.C. 788, 952-53 (Commission will not "under any circumstances" require indemnification for traffic diversion, because "[t]his transfer of funds would, in effect, be a massive cross-subsidization . . . of inefficient operations of another railroad"), *aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *cf. Illinois Cent. Gulf R.R. Abandonment Between Herscher and Barnes*, 363 I.C.C. 690, 703-04 (1980) ("[u]nprofitable operations . . . burden [the carrier] and interstate commerce . . . [and the carrier] should not be required to continue [such] operations . . . regardless of whether it is financially capable of doing so"), *aff'd sub nom. Bloomer Shippers Ass'n v. ICC*, 679 F.2d. 668 (7th Cir. 1982); *Emergency Petition of Chicago South Shore & South Bend R.R.*, Finance Docket No. 31348, 1988 ICC LEXIS 354 (Nov. 21, 1988) (authorizing South Shore Railroad to discontinue passenger operations on money-losing line "in view of our policy of not requiring cross subsidy").

ideas." *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1054 (D.C. Cir. 1989). *See also Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 317 (D.C. Cir. 1983) (reviewing Commission decisions; noting that "the ICC itself, as a policy matter, opposes on efficiency grounds the subsidizing of money-losing lines").

In this case, Amtrak is subsidizing its own operations by taking property from others. The subsidy is hidden, but it is real. Amtrak takes property from Boston & Maine at a low value, and transfers it to a competitor, Central Vermont, for whom the property has a high value, because it permits Central Vermont to eliminate B&M's competition in the area.[16] Central Vermont then enters into a favorable contract with Amtrak under which CV provides valuable services to Amtrak at a low price. There is a *difference in value* between what B&M received for the property and what CV would have to pay for it in a free market. That difference—a kind of "float"—is transferred to Amtrak to subsidize its operations. Thus, Amtrak in effect pays for its operations by selling its condemnation authority.

[16] It is well established that the condemnee is not entitled to compensation based on the value of the property to the condemnor, but only based upon its fair market value to the condemnee at the time of the taking. *See, e.g., United States v. Miller*, 317 U.S. 369, 375 (1943) ("Since the owner is to receive no more than indemnity for his loss, his [just compensation] award cannot be enhanced by any gain to the taker.") (footnote omitted). Thus, even though the property may be worth more to the condemnor than to another purchaser, the condemnee does not receive the augmented value but only the "market value" at the time of the taking. *Id.* ("[A]lthough the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.") (footnote omitted). Thus, B&M's "just compensation" bore no relation to what its line was worth to Amtrak and Central Vermont.

The Commission's determination in this case permits precisely the sort of cross-subsidization that it so vigorously resists in other contexts, and is simply inconsistent with the will of Congress and the Commission's prior precedents.

c. The Commission's Construction Flies In The Face Of The Legislative History

The plain language of the statute and the policy it is intended to further leave no doubt as to its proper interpretation. But even if resort is made to the legislative history, it is clear that Congress had no intention of giving Amtrak free rein in taking other people's property. The Section 402(d) power was sought by Amtrak to acquire *terminal* properties, as Amtrak's president explained in his testimony on the proposed amendment:

> We are really speaking here of rather modest applications of [the eminent domain] principle. We have situations which arise *primarily with respect to station locations.* For example, we have a very large station, very expensive and costly station to maintain, not needed by the public and we would like to move.
>
> Normally, the place we would want to move to is further down the railroad right-of-way, and we find it very difficult to negotiate fair and reasonable prices for the acquisition of property for that purpose.

Financial Assistance To Amtrak: Hearings on H.R. 8351 Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 60 (1973) (Statement of Roger Lewis, President, National Railroad Passenger Corporation (Amtrak)) (emphasis added). Amtrak's president was questioned closely on this issue, and Representative Shoup noted that he was pleased that Amtrak intended to use

this condemnation authority "only a minimal amount of time." *Id.*

The purpose of this authority is spelled out in the Senate Report on the bill creating Section 402(d):

> At the present time [Amtrak] leases *terminal and other facilities* from various railroads. These facilities are not always best adapted to Amtrak's needs, nor is a *lease* always the most economical means by which Amtrak could fulfill its requirements for a *facility.* For instance, it might make more economic sense for [Amtrak] to *build a new facility at a different location.* This may prove impossible if the only suitable alternative property sites are owned by the railroad which is the lessor of the existing facility. Under these circumstances, there is little economic incentive for the railroad to make *alternative property sites* available to [Amtrak]. The result may be that Amtrak cannot acquire property it needs at a reasonable price. Because of the relatively inflexible site requirements of property [Amtrak] typically would want to acquire, Amtrak could easily be put in a very disadvantageous bargaining position. *It is precisely for this reason that railroads have generally been granted the power of eminent domain under State law.*

S. Rep. No. 226, 93rd Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphasis added). The senate report goes on to discuss reasonable compensation for a railroad's property acquired by eminent domain pursuant to Section 402(d): "[I]t is anticipated that the [Commission] would consider claims for additional compensation when the condemnation of an interest in a part of a railroad *building or other facility* renders the remainder of such facility useless to the railroad." *Id.* (emphasis added).

The legislative history of Section 402(d) contains no reference to Section 402(a). It makes no reference to trackage rights or the *use* of tracks. All of the relevant discussions go to Amtrak's acquisition of physical property needed for *Amtrak's* facilities. The concept that Section 402(d) was supposed to be some kind of alternative to Section 402(a) was never raised anywhere in the statute's history. On the contrary, the entire background of Section 402(d) suggests that Congress did not intend it to be used to acquire rights to *use* tracks, which Amtrak had already been granted. It is also evident that Congress contemplated a *limited* power, which belies the broad construction now urged by Petitioners.[16]

3. Private Exercises Of Eminent Domain Authority Must Be Construed Narrowly.

Finally, the Commission's construction is also at variance with settled principles of eminent domain law, which Congress clearly had in mind when drafting section 402(d). *See* S. Rep. No. 226, 93rd Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (reasoning behind grant of eminent domain power to Amtrak same as reason why states provide eminent domain power to railroads).

Congress created Amtrak as a private, for-profit corporation, which is authorized to issue common and pre-

[17] Section 402(d) as originally enacted contained the further limitation "required for the *construction* of tracks or other facilities necessary to provide intercity rail passenger service." Amtrak Improvement Act of 1973, Pub.L.No. 93-146, § 9, 87 Stat. 548, 611. The statute was amended in 1976 to remove the requirement that condemnations only be for "construction of tracks or facilities." *Railroad Revitalization and Regulatory Reform Act of 1976*, P.L. 94-210, § 705(h), 90 Stat. 31, 125. This permitted Amtrak to use its condemnation powers to acquire *existing* facilities, but did not expand its authority to take property that was not itself necessary for intercity rail passenger service. *See* Sen. Rep. No. 499, 94th Cong., 2d Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 1, 119-20.

ferred stock to other railroads and individuals. 45 U.S.C. §§ 541, 544 (1988). Congress provided that Amtrak "will not be an agency, instrumentality, authority, or entity, or establishment of the United States government." *Id.* § 541.[18] As Amtrak is not an arm of the sovereign, its condemnation powers are not an exercise of the sovereign legislative power of the United States.[19]

When a legislature delegates the power of eminent domain to a private corporation operating for the public convenience, the grant of power is limited by the statute authorizing its use, and does "not include sovereign powers greater than those expressed or necessarily implied." *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). Thus, as the Third Circuit has noted, "the eminent domain power delegated to private groups has always been more closely limited than that inherent in sovereignty." *United States v. Certain Parcels of Land*, 215 F.2d 140, 148 (3d Cir. 1954); *accord, United States v. 82.46 Acres of Land*, 691 F.2d 474, 477 (10th Cir. 1982) (where statute confers a qualified delegation of condemnation power, the "question of necessity is subject to judicial review").[20] Similarly, it has been held that when a statute is silent as to the

[18] Amtrak is also made subject to the District of Columbia Business Corporation Act to the extent it does not conflict with RPSA. 45 U.S.C. § 541.

[19] Thus, the deference given to the sovereign's discretion in eminent domain cases such as *Shoemaker v. United States*, 147 U.S. 282, 298 (1893), is irrelevant to this case.

[20] This settled authority regarding the construction of eminent domain power in the hands of private parties, together with the plain language of Section 402(d), directly refutes Amtrak's argument, Amtrak Br. 21, that the Commission should not "second-guess Amtrak's assessment of its needs or limit each conveyance to the minimum interest the Commission might think Amtrak needed." Whether to condemn the property of another railroad is not a decision "left to Amtrak's business judgment," ICC Br. 13, but one for the Commission to make in consideration of the statutory prerequisites for the use of the condemnation power.

type of property interests to be taken, a private condemnor may only take the estate that is necessary for the particular public use justifying the taking.[21] *New Mexico ex rel. Norvell v. Callaway*, 389 F.Supp. 821, 824 (D.N.M. 1975); *Miller v. Transcontinental Gas Pipe Line Corp.*, 358 F.Supp. 1357, 1362 (W.D.La. 1973); *Superior Oil Co. v. Harsh*, 39 F.Supp. 467, 470-71 (D.C. Ill. 1941), *aff'd*, 126 F.2d 572 (7th Cir. 1942). The normal rule is that "when an easement will satisfy the purpose of the grant, the power to condemn the fee will not be included in the grant unless it is expressly so provided." 3 *Nichols on Eminent Domain* § 9.2[2] at 9-18. *See also Isley v. Bogart*, 338 F.2d 33, 34 (10th Cir. 1964); *McDonald v. Board of Miss. Levee Comm'rs*, 646 F. Supp. 449, 464 (N.D. Miss. 1986), *aff'd*, 832 F.2d 901 (5th Cir. 1987).[22]

Section 402(d), far from providing that Amtrak must take the entire property, specifically states that it may

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[21] This rule of construction of a statutory condemnation power applies in determining both the quantum of the estate and the amount of property to be acquired for public use. *McDonald v. Board of Miss. Levee Comm'rs*, 646 F. Supp, 449, 463 (N.D. Miss. 1986), *aff'd*, 832 F.2d 901 (5th Cir. 1987); *cf. Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 901 (2d Cir. 1983) (county exercising qualified power of eminent domain cannot "condemn an estate in excess of that which is needed to accomplish the intended public purpose").

[22] Thus, lower courts have held that takings by public utilities must be more closely scrutinized than a condemnation by a governmental entity. *See United States v. Jotham Bixby Co.*, 55 F.2d 317, 319 (S.D. Cal.), *aff'd sub nom. C.M. Patten & Co. v. United States*, 61 F.2d 970 (9th Cir. 1932), *vacated as moot*, 289 U.S. 705 (1933); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 688 F. Supp. 1245, 1249 (N.D. Ohio 1988). *See also* 1A *Nichols on Eminent Domain* § 3.213[1] at 3-92. Such scrutiny has been held to require that the statute be construed in a manner more favorable to the condemnee than the condemnor. *See McDonald*, 646 F. Supp. at 463-64; *Columbia Gas Transmission*, 688 F. Supp. at 1249; 1A *Nichols on Eminent Domain* § 3.213[4] at 3-102 (the rule of strict construction "is intended for the benefit of the owner who is deprived of his property against his will").

take only that property that is "required for intercity rail passenger service." The Second Circuit accordingly has found that Amtrak has only "a limited power [of eminent domain] within the meaning of *United States v. Carmack*, to condemn land 'required [for] intercity rail passenger service.'" *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir.) (quoting 45 U.S.C. § 545(d)(1)(B) (1982)) (citation and footnote omitted), *cert. denied*, 484 U.S. 954 (1987).

Yet the Commission read that authority so broadly that it permits Amtrak—a private party—to do the kind of restructuring of railroad ownership that Congress has not even entrusted to the Commission. The Commission itself lacks the power to decide that one railroad's property ought to be transferred to another, even when the Commission believes it to be in the public interest. *See St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 305 (1954) ("Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad"). A reading that stretches Amtrak's eminent domain power beyond even the Commission's reach must be rejected.

B. The 1990 Amendment To RPSA Does Not Change The Analysis Of The Statute.

Petitioners rely heavily on the 1990 Amendment to RPSA and, more important, its very brief legislative history. That reliance is misplaced. The 1990 Amendment is absolutely clear:

> [Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.

104 Stat. 4654, 4658. The Amendment was introduced by Senator Jeffords of Vermont on the last full day of the

1990 legislative session. There were no debates, no hearings and no committee reports dealing with this amendment. Senator Jeffords' brief comments refer specifically to that aspect of the court of appeals' decision that he believed undercut Amtrak's ability to subsequently convey property it had condemned:

> The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.
>
> . . .
>
> The court decision, however, ruled that Amtrak's subsequent transfer of the line to another railroad for rehabilitation and maintenance exceeded the court view of Amtrak's powers.
>
> This amendment clarifies that, with this and any future case . . . .

136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990).

The amendment that Senator Jeffords introduced settles the point that Amtrak has statutory authority to subsequently convey property that it has properly condemned. The statute is plain and unambiguous. "In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute 'must ordinarily be regarded as conclusive.' " *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). "When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

As the court of appeals noted in denying rehearing, the 1990 Amendment simply has nothing to do with Section 402(d)'s requirement "that the property . . . may not be condemned in the first place if it is not 'required for intercity rail passenger service.'" Pet. App. 3a. Congress

did not change the necessary predicates to the invocation of a proceeding under Section 402(d), and certainly did not rule legislatively that they were met in this case. Thus, Petitioners' argument that the court of appeals frustrated the will of Congress and "nullified" its action, ICC Br. 28, is without merit.

Had the amendment been intended to change the statutory basis for invoking Section 402(d), it obviously would have used far different language. Petitioners ask this Court to conclude that Congress must have intended something much broader than it enacted. But as Justice Scalia noted in his concurrence in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987), "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."

The language of the 1990 Amendment is clear. Even if Senator Jeffords' brief remarks could be used to vary that language, they do not even purport to affect the fundamental problems with the Commission's decision that were noted by the court of appeals. The problem with Amtrak's taking, as the court of appeals noted on reconsideration, is not that it subsequently reconveyed the property interest to another, but that it condemned a property interest that was not required for intercity rail passenger service. Nothing in the 1990 Amendment alters RPSA to permit such a condemnation.

II. THE AUTHORITY CLAIMED FOR AMTRAK IN THIS PROCEEDING WOULD BE UNCONSTITUTIONAL.

If Section 402(d) of RPSA were construed in a way that permitted what has happened here, it would be unconstitutional. The Commission refused to consider the constitutional issues in reaching its construction of the statute. In her dissent, however, Chairman Gradison noted the serious Fifth Amendment problems involved in using the

eminent domain power simply to change the ownership of private property without changing its use. Pet. App. 97a. The court of appeals, although it did not reach the issues, noted that the Commission's construction raised "at least colorable Fifth Amendment problems." Pet. App. 21a.

The action of Amtrak approved by the Commission is unconstitutional because this transaction involves nothing more than the transfer of private property from one private owner to another, with no corresponding change in public use, and thus violates the Fifth Amendment.

A. The Conveyance Of B&M's Property To CV, Without A Corresponding Change In Use, Violates The Fifth Amendment To The Constitution.

The Fifth Amendment prohibits the taking of "private property . . . for public use without just compensation." U.S. Const. amend. V. The requirement of "public use" is separate and distinct from the requirement of "just compensation." This Court has "repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). *See Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 416-17 (1896) (state utility commission could not order railroad to allow private parties to build grain elevator on railroad property even though state found that it would benefit the public).

Here, Boston & Maine had a privately owned rail line that was used for common carriage of freight and passengers. Amtrak had a contract to use that line. The result of the condemnation of B&M's line is that now Central Vermont has the same privately owned rail line that is still used for common carriage of freight and passengers. There has been no change whatsoever in the nature of the use. That Amtrak has entered into various other contracts

because it prefers dealing with Central Vermont to dealing with Boston & Maine does not alter the fact that *the use of the property is identical.* The only thing that has changed is the ownership.

But a "justifying public purpose" under *Midkiff* is not simply a desire to change the ownership of the property; it is a change in the intended use of the property taken. Thus, this Court, in *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 547 (1848), affirmed the doctrine that the sovereign has the power to condemn property where it "vests both a new benefit and use . . . in the public." In *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 694 (1897), this Court noted the distinction between a true public use—such as the municipal utility ownership at issue—and merely "turning property from one private corporation to another." As Justice Holmes later noted, cases like *West River Bridge* and *Long Island Water-Supply* "show the difference between an attempt to transfer property from one private person to another and the taking of it for public administration by a public body." *Galveston Wharf Co. v. City of Galveston*, 260 U.S. 473, 476 (1923).

It has therefore been consistently held in state and federal courts that where the condemnation merely changes owners, without changing the use to which the property is put, there is no "public use" involved, and the condemnation is unconstitutional. *See Washington ex rel. Harbor Boom Co. v. Superior Court*, 65 Wash. 129, 133 (1911) ("legislature is powerless to authorize" one boom company to take property of another and dedicate to identical public use); *Ingalls v. Ingalls*, 150 Mass. 57 (1889) (holding unconstitutional the authorization of a transfer by eminent domain of public library from one private owner to another for the same use). *See also Illinois Cities Water Co. v. City of Mt. Vernon*, 144 N.E.2d 729, 733 (Ill. 1957); *NL Indus., Inc. v. Eisenman Chem. Co.*, 645 P.2d 976, 980 (Nev. 1982). Thus, where one railroad tries to take the

property of another, and the railroad will be used for the same purpose, there is no "public use" and the taking is improper. *See Philadelphia, Morton & Swarthmore St. Ry.'s Petition*, 203 Pa. 354 (1902) (holding unconstitutional statute authorizing one street railway to appropriate the use of another's tracks); *Illinois Cent. R.R. v. Chicago, Burlington & N. R.R.*, 122 Ill. 473 (1887) (dismissing condemnation petition of one railroad company to the extent it would take the right of way of another railroad company for railroad purposes).

This issue has rarely been litigated in federal court. As far as Respondent can determine, no private corporation created by the United States has ever tried to use the power of eminent domain to take another private entity's property and transfer it for the same use to another, with whom it hopes to get a better deal. On the contrary, every case this Court has been called upon to decide has involved situations where the property was being taken for public administration, or where the use to which the property was being put was changed in a significant way.[23]

Petitioners point to this Court's decisions in *Midkiff* and in *Berman v. Parker*, 348 U.S. 26 (1954), both of which involved condemnation of private property for ultimate conveyance to other private parties. *See* ICC Br. 23-24 n.19; Amtrak Br. 42. But those cases, far from supporting the type of transaction that occurred here, both involved substantial *changes* in the use of the property, not the mere transfer of an interest from one person to another.

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[23] *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (large estates used for multiple tenancies condemned to create fee ownership in single-family residential lots); *Berman v. Parker*, 348 U.S. 26 (1954) (slum dwellings condemned to create redeveloped zone); *Carmack*, 329 U.S. at 238-39 (site used by state government taken for construction of federal post office); *West River Bridge*, 47 U.S. (6 How.) at 547 (converting private toll bridge to public free bridge); *Long Island Water-Supply Co.*, 166 U.S. at 694 (converting private utility property to public ownership); *Galveston Wharf*, 260 U.S. at 476 (same).

In *Midkiff*, the legislature did not merely take one lessor's oligopolistic landholding and convey it to a competing lessor, who would continue to lease homes to individuals; it took the property for the purpose of breaking it up into small, individually owned pieces to further a specific public policy favoring land reform and individual homeowners. In *Berman*, the legislature did not simply take an office building from one private party and give it to another to use as an office building; it determined that slum clearance and urban renewal required the complete redevelopment of an area with a correspondingly fundamental change in character.

Both *Midkiff* and *Berman*, moreover, involve specific determinations made by the legislative authority. Where the legislature speaks specifically, courts do not set aside such determinations "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896), quoted in *Midkiff*, 467 U.S. at 241. But, as noted above, where such power is exercised by a *private* entity, none of this legislative deference applies.

Neither this Court nor any other has ever held that private property can be forcibly conveyed from one private person to another simply because the sovereign believes the new owner would do a better job of running it, or because the sovereign believes it would get a better contract from the new owner.[24] The fundamental problem of the petitioners' positions is underscored, where, as here,

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[24] The sovereign has the power to award or withdraw franchises or permits for certain public services on such grounds. It can, for example, decide that one carrier should not be authorized to provide certain classes of services, which could in certain situations have the effect of putting the carrier out of business. But even the sovereign cannot take the privately owned equipment and facilities of such a carrier and convey them forcibly to a competitor even if it believes the competitor will do a better job in providing services.

it is not the sovereign making such a determination, but the officers and directors of a private for-profit stock company. Under these circumstances, permitting Amtrak to convey to another the entire interest it takes, with no change in use, violates the Fifth Amendment.

B. The Commission Had The Responsibility To Monitor Closely The Exercise of Amtrak's Power Of Eminent Domain.

It is the Commission's job to ensure that Amtrak's condemnation authority is limited to property that is "required for intercity rail passenger service." The Commission, however, abdicated its responsibility here. By holding that it was for Amtrak, not the Commission, to elect the statute under which it would proceed and to decide the extent to which it would condemn the particular property, Pet. App. 39a, the Commission gave unfettered authority to a private company.

Under the Commission's construction of RPSA there is, in fact, no limit on the property that Amtrak may take, so long as it pays for that property and gives trackage rights, if necessary, to the condemnee. No private entity can constitutionally exercise that kind of unfettered domain over the property of others.[25] The Commission's construction is therefore impermissible and should be rejected.

III. THE COMMISSION FAILED TO FIND THE NECESSARY FACTS TO JUSTIFY THE TAKING AT ISSUE.

Even if Amtrak had the authority it claims, and the constitutional ability to exercise it, its condemnation of

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[25] In another context, this Court has struck down statutes which allowed private parties to exercise control over the property of others without effective state involvement regulating such conduct. *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972) (private parties with power to replevy property of others without state control); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (statute giving private party a veto power over liquor license applications).

B&M's line is still fatally defective because the Commission completely failed to make the findings necessary to justify this taking.

The statute unambiguously requires, as a condition of any condemnation, that (1) the parties be "unable to agree" on the sale of the property, and (2) the property to be taken be "required for intercity rail passenger service." The Commission must make appropriate findings on these issues before any property can be taken. All of the judges on the panel below found that the Commission failed to ascertain whether the conveyance from B&M to CV was in fact required to meet Amtrak's passenger service obligations. Pet. App. 18a, 27a. Subsequent to the 1990 Amendment to RPSA, the majority reiterated its earlier conclusion that the Commission had failed to make adequate findings under Section 402(d) and, therefore, had not properly determined that the condemnation of the B&M line was required for intercity rail passenger service. Pet. App. 3a. Likewise, Judge Ginsburg found that the 1990 Amendment did not change the fact that the Commission had simply failed to make findings and provide a "satisfactorily reasoned statement" in support of its decision. Pet. App. 4a.

It is axiomatic that where Congress puts specific conditions on the exercise of a particular statutory power, the agency charged with administration must satisfy those conditions before it can exercise the power. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962); *ICC v. J-T Transp. Co.*, 368 U.S. 81, 93 (1961); *Thomas Paper Stock Co. v. Porter*, 328 U.S. 50, 53-54 (1946). Thus, when Congress says, "If *X* occurs, the agency may do *Y*," the agency must find that *X* did, in fact, occur before it can do *Y*. An agency determination that does not find facts sufficient to satisfy the statutory predicate is fatally flawed.

Here, Congress placed explicit conditions on any exercise of the condemnation power by Amtrak. The Commis-

sion resolved these issues *before* the condemnation proceeding was instituted and hence it could not and did not make the necessary factual findings.

Under section 402(d), Amtrak must first show that it has been "unable" to agree on terms for the sale of the property. That requires a finding of an *inability* to agree, not merely a refusal on Amtrak's part to negotiate. As noted above, this requires good faith, *bona fide* negotiations between the parties. Amtrak made a single take-it-or-leave-it offer to Boston & Maine at an extremely low price that it knew would not be accepted as proposed. J.A. 94.[26] Boston & Maine responded by seeking negotiations but was rebuffed by Amtrak. J.A. 59, 111-112. Moreover, at the time Amtrak made its offer, it had already reached agreement in principle with Central Vermont for the sale and rehabilitation of the line. J.A. 92-95. The facts certainly show that Amtrak was *unwilling* to reach an agreement with Boston & Maine, but the Commission adduced no evidence that Amtrak was *unable* to do so.

Second, the Commission must find that the property interest to be taken is one "required" for intercity rail passenger service. The Commission must find that the property to be taken—both the amount and the type of estate—is required for the public purpose for which it is sought. Anything in excess of what is "required" is not authorized by the statute and would, in fact, not be for the public use.[27] As the court of appeals found, "[W]hat

[26] The $1 million offer was made on March 18, 1988. J.A. 55. On August 4, 1988, the Commission established "just compensation" at $2,373,286. Pet. App. 105a. B&M's appeal challenged the amount fixed by the Commission as too low; that issue was not reached by the court of appeals and is not before this Court. Pet. App. 13a-14a.

[27] Intercity rail passenger service is, in general, a "public use." All railroads, in fact, are considered "public uses." *See Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 573 (1904). But the fact that Amtrak generally engages in public services does not obviate the requirement that the Commission specifically find that the particular property sought to be condemned by Amtrak—here, the fee simple interest in the Conn River Line—be "required" for that public use.

[Amtrak] required, and what in fact was all it sought, in substance if not in form, was not title to the Boston & Maine segments but its use in a condition permitting resumption of the Montrealer service." Pet. App. 18a. Yet the Commission did not consider whether a trackage rights agreement would be sufficient. Nor did it examine whether Amtrak needed all of B&M's interest, or whether a trackage rights agreement together with an easement, or a license, or a lease, or any other lesser estate in the property would be sufficient.[28]

Amtrak contends that what it obtained was not just the use of the B&M tracks but also their rehabilitation. Amtrak Br. 10. But Amtrak itself paid for that rehabilitation, and the record contains no finding that a conveyance to Amtrak was necessary for that rehabilitation.[29] For reasons having to do with business considerations rather than any public interest principle, Amtrak preferred to make Central Vermont, rather than Boston & Maine, the beneficiary of federal funds. The Commission made no finding that Boston & Maine could not have adequately upgraded the line, and expressly disavowed any doubt as to Boston

[28] Amtrak's argument, Amtrak Br. 30-31 n. 20, is that it is only necessary for the Commission to determine that Amtrak intends to use the rail line "in connection with" its rail passenger operations, in order for the Commission to go on to make findings under Sections 402(d)(1)(A) and (d)(1)(B). By contending that "in connection with" is equivalent to "required," Amtrak would undermine any limitation on the use of the section 402(d) authority.

[29] In fact, when Congress appropriated the funds used for the rehabilitation, it anticipated that B&M would be performing the repairs and restoration work under an agreement with Amtrak. *See Making Supplemental Appropriations for the Fiscal Year Ending Sept. 30, 1987*, H.R. Conf. Rep. No. 195, 100th Cong., 1st Sess. 94 (1987); *see also* Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447.

& Maine's ability to do so before the court of appeals. Pet. App. 27a. There is therefore no merit in Amtrak's contention that it "needed" to take the entire B&M line in order to use it.

Third, the Commission failed to make sufficient findings on the issue whether the requested condemnation would significantly impair Boston & Maine's ability to carry out its obligations as a common carrier, or whether Amtrak's needs could be adequately met by the acquisition of an alternative property (or interest in property) available for sale to Amtrak or through its Section 305(d) condemnation power.[30] Because Boston & Maine had made an explicit claim of significant impairment before the Commission, the court of appeals properly refused to uphold a determination that "dismisses [B&M's] detailed exposition with the cursory statement that its ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont." Pet. App. 19a. The Commission simply failed to consider the ramifications of requiring B&M to take trackage rights from its principal rival in the condemnation proceeding.[31]

Judge Ginsburg, concurring in the judgment of the court of appeals, specifically noted that no Commission determination of any of these issues "can be gleaned from this record." Pet. App. 27a. She noted that the Commission

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[30] Amtrak categorically states that no "lesser interest" in the B&M property was available, Amtrak Br. 23; but Amtrak made no offer to purchase a lesser interest.

[31] That the Commission reviewed the trackage rights agreement among Amtrak, CV and B&M in a subsequent proceeding, and imposed what it considered to be reasonable terms for B&M's use of the Conn River Line, does not cure the problem. The statute clearly requires that the Commission consider the impairment that arises from the *conveyance*, which requires its consideration at the condemnation proceeding stage. This the Commission failed to do.

conceded before the Court of Appeals that it had made no independent effort to ascertain whether, in fact, the Conn River Line conveyance was required for intercity rail passenger service, and that it had "disavowed" any doubt as to B&M's competence to maintain the line in question. *Id.*

As Judge Ginsburg concluded, even if Amtrak had the power it sought, "the ICC shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by Section 402(d) of the RPSA." *Id.*

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed. The mandate of the court of appeals should issue, and this matter should be returned to the Commission so that Boston & Maine may recover its property from Central Vermont.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL., PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

Respondent defends the judgment below on three grounds. It contends that (1) the ICC's order allowing Amtrak to condemn respondent's track and transfer it to Central Vermont is unauthorized by Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d); (2) if authorized by Congress, the condemnation violates the Public Use Clause of the Fifth Amendment; and (3) if authorized and constitutional, the ICC's order is unsupported by sufficient factual findings. None of those claims has merit.

1. Section 402(d) authorizes Amtrak's condemnation of respondent's track

In the main, respondent's statutory arguments are addressed to the wrong issue; the question is not whether the pre-amendment version of Section 402(d) authorizes the condemnation in this case. Rather, the question is whether this transaction is authorized under Section 402(d) as amended by Congress in 1990—an amendment passed for the very purpose of overruling the court of appeals' initial and erroneous statutory interpretation in this case.

a. As to the effect of the amendment, there can be no doubt: Congress explicitly clarified that Amtrak may validly condemn property under Section 402(d) notwithstanding its intention to reconvey the interest it acquires to a third party. The 1990 amendment states: Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a), 104 Stat. 4568, amending 45 U.S.C. 562(d)(1) [hereinafter ISBA]. The purpose of this amendment was to reject the court of appeals' reasoning that, because Amtrak intended to reconvey the fee interest it had condemned from respondent to another railway, that interest could not be "required for intercity rail passenger service" under Section 402(d).[1]

[1] The centrality of that line of reasoning to the court of appeals' holding is evident throughout its opinion. See Pet. App. 18a ("the property to be acquired must be for the use of Amtrak, and not one which, as here, Amtrak had no intention of retaining"); *id.* at 20a (rejecting suggestion that Amtrak could condemn property to have "a responsible owner for the B&M segment, one that could be counted on to maintain the tracks in a condition suitable for the Montrealer," because the statute focuses on "Amtrak's need" to own the property); *id.* at 23a (ICC's "construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak"). After ISBA, the court of appeals' construction is untenable.

Respondent barely attempts to reconcile the court of appeals' reasoning with the amendment. Respondent states (Resp. Br. 34) that "[t]he amendment * * * settles the point that Amtrak has statutory authority to subsequently convey property that it has properly condemned," but ignores the point that the very purpose of the amendment is to ensure that Amtrak can consummate a transaction such as this, in which Amtrak intends to reconvey condemned rail property, used in its provision of passenger train service, to a third-party owner.

Under respondent's approach to ISBA, the amendment serves no purpose at all. As we explain in our opening brief (Pet. Br. 28-29; see Amtrak Br. 40-41) Amtrak was fully empowered, prior to the 1990 amendment, to dispose of property it had acquired by condemnation or otherwise. The amendment was not needed to authorize such a conveyance; it was needed to ensure that a plan by Amtrak to convey condemned property would not invalidate the initial condemnation, as the court of appeals had ruled. Yet under respondent's approach, the amendment could never apply to any condemnation; if Amtrak attempted to rely on it to convey condemned property, that action would reveal that the property was not "required for intercity rail passenger service" by Amtrak in the first place.[2]

[2] This is made clear by respondent's claim (Resp. Br. 21) that under Section 402, "Amtrak is not authorized to condemn

Respondent's only answer is to imply (Resp. Br. 33-34) that the 1990 amendment should not be taken seriously because it was introduced "on the last full day of the 1990 legislative session" and was not accompanied by committee reports. The amendment, however, became law in exactly the way the Constitution provides: it was passed by both Houses of Congress and signed by the President. Const. Art. I, § 7. Moreover, there can be no doubt that the legislators were aware of the purpose and effect of the amendment. Senator Jeffords' floor statement clearly explained that "this provision is intended to clarify the authority used by * * * [Amtrak] to acquire a portion of the Montrealer route in the States of Vermont and New Hampshire." 136 Cong. Rec. S17,668 (daily ed. Oct. 27, 1990). The Senator noted that the court of appeals had "ruled that Amtrak's subsequent transfer of the line to another railroad for rehabilitation and maintenance exceeded Amtrak's powers," and that the "amendment clarifies that, with this and any future case, Amtrak can convey interests in con-

any more property or any larger interest in property than is *required* for intercity rail passenger service." Respondent goes on to say that its reading of the statute (even prior to the amendment) would not prohibit Amtrak from conveying property to a third party after having condemned it, such as when Amtrak condemns an easement to fulfill a maintenance need and then assigns the property and the maintenance obligation to a third party. Resp. Br. 22. But respondent offers no coherent analysis of the statute that distinguishes that case from this one, and its struggle to do so (*id.* at 22 n.8) simply reflects policy judgments about when it would be appropriate to find that Amtrak "requires" property that it does not wish ultimately to own. Before the amendment, policy judgments of that sort were for the ICC, not for the courts: by enacting the amendment, Congress itself established the controlling policy.

demned property to a third party when such conveyance furthers Amtrak's statutory purpose under the Rail Passenger Service Act, as it did in the Montrealer situation." *Ibid.* Senator Jeffords' remarks do not "vary" the language of the amendment (Resp. Br. 35); they underscore, with unusual clarity, that the intent of the amendment is to authorize Amtrak to condemn property even where, as here, it ultimately wishes to use, rather than to own, the property it has condemned.

b. Even as to the pre-amendment version of Section 402(d), respondent errs in arguing (Resp. Br. 19) that the statute was "clear" that Amtrak could not condemn property when all it really "required" was trackage rights or service agreements under Section 402(a). The statute says no such thing. As the ICC's order pointed out, the statute does not subordinate the condemnation power under Section 402(d) to a rule that Amtrak must first seek prescribed trackage or service rights under Section 402(a). Pet. App. 42a-43a, 115a-116a. Rather, the statute gives Amtrak the initiative in applying for the particular form of relief it desires. 45 U.S.C. 462(d) (Amtrak "may apply to the Commission for an order * * *."). Section 402(d) sets out the prerequisites to the exercise of condemnation authority, and exhaustion of any relief available under Section 402(a) is not among them.

The ICC must determine that the property to be condemned is "required for intercity rail passenger service," but the statute does not compel the ICC to adopt respondent's definition of that phrase.[3] Under

[3] Respondent misstates our position as being that Amtrak "is entitled to any property it chooses" as long as the statutory "need" requirement of Section 402(d)(1)(A) and (B)

respondent's view of the "required" proviso, the ICC must examine whether Amtrak had a truly compelling "need" to take property, a need that could not be satisfied through some other remedy provided in Section 402. The difficulty with that contention is that the "required" phrase does not say this; it may reasonably be interpreted to mean instead that Amtrak is limited to taking property that is useful or appropriate in Amtrak's provision of intercity passenger train service, rather than property relating to some other line of business. Pet. Br. 17. The ICC, as the agency responsible for administering the statute, is authorized to resolve the ambiguity, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and it did so here by upholding this transaction [4] and by rejecting respon-

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is satisfied. Resp. Br. 23-24. The Commission recognizes that the property must be "required for intercity rail passenger service"; the issue is what that phrase means.

[4] The ICC noted that Amtrak sought the condemnation here "so that [Montrealer] passenger service may be resumed over [respondent's] line," Pet. App. 122a, and it recounted Amtrak's explanation that "it was compelled to discontinue this service in April 1987 due to the deterioration of [respondent's] track segments along the route"; that Amtrak "cannot reach agreement with [respondent] for the resumption of this service"; and that respondent "is considering discontinuance of rail service altogether on the line." *Ibid.* Against that background, the ICC reasonably found that "Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line" in order to restore Montrealer service. *Id.* at 43a. Contrary to the repeated claim of respondent and its amici (Resp. Br. 2 n.1, 22 n.8, 42-43; Amici Concerned Railroads Br. 30), that finding was adequate. "The explanation may have been curt, but it surely indicated the determinative reason for the final action taken." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

dent's view that Amtrak must show that no "lesser" interest than fee simple acquisition could possibly suffice.[5] The ICC's approach is a permissible one; it is consistent with the language of the statute and it reasonably implements the statute's purpose of giving Amtrak the remedies it needs to structure a network of routes for intercity rail passenger service.

Respondent contends (Resp. Br. 26-28) that the ICC's interpretation allows Amtrak to enter into arrangements that conflict with an asserted policy against cross-subsidization within the rail industry. The Rail Passenger Service Act, however, establishes as goals for Amtrak the "[e]ncouragement of * * * the private sector to share the costs of operating rail passenger service * * * in order to minimize Federal subsidies" and the "[d]evelopment of service on rail corridors, subsidized by * * * private parties." 45 U.S.C. 501a(2) and (7). Section 402(a) explicitly allows the ICC to grant Amtrak prescribed trackage rights upon paying the railroad's incremental cost—a rate that provides a subsidy to Amtrak since it does not include a share of fixed costs.[6] In light of those

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[5] The ICC did not delineate all of the other possible situations to which Section 402(d) might apply beyond the facts presented to it. Accordingly, respondent's claim (Resp. Br. 43 n.28) that the decision "undermine[s] any limitation on the use of section 402(d) authority" is incorrect.

[6] The cross-subsidy that Section 402(a) prohibits is the cross-subsidy of a freight railroad *by Amtrak*, when Amtrak is the party granting trackage rights. 45 U.S.C. 562(a)(2). Respondent cites no case applying a similar policy to Amtrak's receipt of services. Most of the "cross-subsidy" cases cited by respondent (Br. 25 n.16) involve freight trains, not passenger trains, and the one that does involve passenger trains does not involve Amtrak. In any event, the Commission subsequently vacated it when the parties settled. *Chicago*

provisions, the ICC's approval of a reconveyance transaction under Section 402(d) is not invalid because it permits a more efficient arrangement for the use of the property by Amtrak.

Nor is the validity of the ICC's construction undermined by a supposed conflict with "settled principles of eminent domain law." Resp. Br. 30. Respondent argues that Section 402(d) must be construed narrowly because it confers eminent domain authority on a private corporation, and because of a presumption that a private condemnor may take only the amount of property that is strictly necessary to fulfill the public use that justifies the taking. The eminent domain authority in this case, however, is administered by the ICC, an agency of the United States.[7] The ICC is required to make the determinations identified by Congress to support the condemnation, and it has the power to reject applications that constitute

South Shore & South Bend R.R. Discontinuance of Passenger Trains Under 49 U.S.C. 10908, Finance Docket No. 31348 (served Dec. 15, 1989).

[7] The procedure for condemnation under Section 402(d) thus contrasts with Amtrak's eminent domain authority under Section 305(d), 45 U.S.C. 545(d), for the taking of non-rail property. Section 305(d) permits Amtrak to file a condemnation petition in district court; the ICC is not involved. In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), cert. denied, 484 U.S. 954 (1987), the court found Amtrak's rights under Section 305(d) to be of the more "limited" condemnation authority—because exercised by a private party rather than the government—which does "not include sovereign powers greater than those expressed or necessarily implied." *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1946) (dictum). The ICC's integral participation in a taking under Section 402(d) distinguishes that provision from Section 305(d).

an abuse of the Act. See Pet. App. 41a-42a (finding that Amtrak "has not abused the process available under § 402(d)" in this case). Cf. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 365 (1984).

In entrusting Amtrak's condemnation of rail property to the administration of the ICC, Congress invested the *agency* with the power to resolve the policy questions raised by ambiguous statutory provisions; the ICC is not required to use common law presumptions that apply when *courts* must fill gaps in vague statutes. *Chevron* mandates judicial deference to the ICC's reasonable interpretations of a statute when Congress has not spoken to the precise issue; that rule does not contemplate judicial review to see whether the agency's analysis accords with how a court might have interpreted the same provisions in light of common law presumptions that may or may not accord with agency policy and expertise. 467 U.S. at 843-844.[8]

2. Section 402(d), as construed by the ICC, is constitutional

Respondent contends (Resp. Br. 36) that, if the ICC did permissibly construe Section 402(d), the taking in this case violates the Public Use Clause of the Fifth Amendment because it permits "the transfer of private property from one private owner to

[8] See *Michigan Citizens for an Independent Press* v. *Thornburg*, 868 F.2d 1285, 1292 (D.C. Cir.) ("*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction."), aff'd by an equally divided Court, 493 U.S. 38 (1989).

another, with no corresponding change in public use." That claim is flawed both factually and legally.[9]

The ICC did not simply approve a transfer of the line from A to B. The order instead approved a transfer from a landlord that had allowed the line to deteriorate, had no incentive to maintain the line in the condition required by Amtrak, and had no agreement with Amtrak permitting Amtrak to run its trains on the track,[10] to a landlord that had maintained its portion of the line in the past (J.A. 48), had every incentive to do so because (unlike respondent) it had no alternative route for its trains, and was willing to enter into a 20-year trackage rights agreement with Amtrak. The result was not simply a change in ownership from A to B but a consequent

[9] Also flawed is the suggestion of Amici Concerned Railroads (Br. 23-30) that Section 402(d) should be construed to avoid reaching this constitutional question. This Court has remarked that it "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States* v. *Locke*, 471 U.S. 84, 96 (1985), quoting *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933). In light of Congress's 1990 amendment of Section 402(d), that principle directly applies here. In any event, there is no reason to avoid the issue because Section 402(d), as construed by the ICC, is constitutional.

[10] See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, Nos. 72 & 74 (Nat'l Arb. Panel Nov. 7, 1988), slip op. 1. Respondent's assertion (Resp. Br. 36) that the use of the line did not change because, both before and after the condemnation, "Amtrak had a contract for the use of that line" is incorrect. Respondent gave notice to Amtrak on May 6, 1987, that it was cancelling the Operating Agreement between the parties; respondent contended in the D.C. Circuit that the trackage rights agreement with Amtrak had expired, see Pet. Br. 5 n.4; and respondent informed the Commission that the agreement between the parties was "terminated." J.A. 97.

change in use allowing restoration of Montrealer service over the line.[11]

In the face of that record, there is no factual basis for respondent's claim that the condemnation and transfer of the line did not bring about a "changed," and clearly valid, public use, even under the legal test respondent advocates. It has long been settled that the takings power can be used to transfer property between railroads in order to permit the development of new railroad uses. *Richmond F. & P. R.R.* v. *Louisa R.R.*, 54 U.S. (13 How.) 71 (1851) (upholding the authority of a State to exercise eminent domain to take the property of one railroad that is authorized to run passenger trains and convey it to another railroad that is authorized to run freight trains).

Respondent's constitutional claim is also unsound as a matter of legal principle. This Court has held that the determination of what constitutes a "public use" is essentially one for the legislature, and the legislature has wide latitude to authorize the compensated transfer of property between private own-

[11] Prior to the condemnation, respondent's line was not used for any passenger train service. Respondent had been granted permission in 1967 to abandon its common carrier obligation to provide passenger service (see Pet. Br. 5 n.3), and Amtrak discontinued Montrealer service on April 5, 1987, nearly one year before instituting condemnation proceedings (Pet. App. 9a, 121a-122a). Following the condemnation, however, respondent's former line is used both for high-speed freight traffic and for passenger service by Amtrak's Montrealer. After being condemned and transferred to Central Vermont, the line was upgraded by Central Vermont (with $3.1 million in funds supplied by Amtrak and additional funds supplied by the State of Vermont, see Vermont Br. 9-10 & n.8) and Montrealer service has resumed. Pet. App. 13a.

ers in order to accomplish a permissible public objective. In *Berman* v. *Parker*, 348 U.S. 26, 33 (1954), this Court upheld legislation authorizing the taking of real property in blighted areas of the District of Columbia for the purpose of transferring it to private entities that would redevelop it. *Id.* at 28-30. The Court made clear that "[t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.* at 32.

In *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 242-243 (1984), the Court enunciated an equally broad view of the legislative power to authorize compensated transfers between private owners. There, in order to reduce the concentration of ownership of real property, Hawaii established a program authorizing the transfer, with just compensation, of property titles from lessors to lessees. In holding that the program satisfied the requirements of the Public Use Clause, the Court stated that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 239, quoting *Berman*, 348 U.S. at 32. The role of a reviewing court is therefore "extremely narrow," and a legislative judgment as to a public use will be accepted "unless the use be palpably without reasonable foundation." 467 U.S. at 241, quoting *United States* v. *Gettysburg Elec. R.R.*, 160 U.S. 668, 680 (1896). "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241.[12]

[12] In light of those holdings, respondent's reliance (Resp. Br. 37-38) on a handful of turn-of-the-century state cases is misplaced. No decision of this Court has struck down a taking on the "no change of use theory"; nor do the Nineteenth Century cases of this Court cited by respondent articulate such a limitation on the condemnation power. *Berman* and *Midkiff* make clear that, on the level of generality at which respondent analyzes the issue, it is fully permissible to change the ownership of private property without changing its use, provided there is an underlying public purpose to which the condemnation is rationally related. See *Midkiff*, 467 U.S. at 243-244 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. * * * In such cases, government does not itself have to use the property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.").

Section 402(d) easily passes muster under those principles. As amended in 1990, Section 402(d) authorizes Amtrak to convey condemned rail property to a third party only "if such reconveyance is found by the [ICC] to further the purposes of this [Rail Passenger Service] Act." The purposes of the Act—the provision of safe, reliable, and economical passenger train service—are undeniably ones within Congress's power to pursue. See *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 570 (1898) ("Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature.").[13]

[13] As respondent acknowledges (Resp. Br. 42 n.27), it has long been settled that railroad service is a "public use." See *Secombe* v. *Railroad Co.*, 90 U.S. (23 Wall.) 108, 118 (1874); *Olcott* v. *The Supervisors*, 83 U.S. (16 Wall.) 678, 694-695 (1872). Likewise, it is settled that the public purposes served by a national rail system may take precedence over the interests of particular private owners. See *New Haven Inclusion*

Section 402(d) is also a rational means to implement Congress's purpose. This case illustrates how Amtrak's condemnation of rail property and subsequent transfer to another railroad can benefit the operations of a national passenger train network. Respondent's parent owns a rail line that parallels the track at issue in this case, and thus respondent had neither the need nor the desire to maintain the track in the high-speed condition that Amtrak requires. J.A. 38-39. The predictable result was poor maintenance and frequent delays. J.A. 41, 43. Central Vermont, in contrast, has no alternative line and therefore has an independent incentive to upgrade the track to high-speed condition and to maintain the track in good working order. J.A. 116, 118, 121. Transfer of the track to Central Vermont therefore affords substantial benefits to the regular and efficient operation of the national passenger train service that Amtrak was created to provide.[14]

Whatever policy objections respondent may have to this approach, those objections do not amount to a valid claim under the Public Use Clause. This Court stated in *Midkiff* that "[a] purely private taking"—one "executed for no reason other than to confer a

Cases, 399 U.S. 392, 491-492 (1970); *Reconstruction Finance Corp.* v. *Denver & R.G. W. R.R.*, 328 U.S. 495, 535-536 (1946). Against that background, there is no reason to think that any compensated transfer of property between railroads, carried out under conditions established by Congress, raises an issue under the Public Use Clause.

[14] Contrary to respondent's contention (Resp. Br. 22 n.8), the ICC's counsel in the court of appeals did not disavow the view that another party besides respondent was needed to have the line rehabilitated; what the ICC's counsel said was that the root of the problem was not respondent's competence to maintain the line, but its "willingness to commit the resources to do it." Tr. 35.

private benefit on a particular private party"—would not be able to "withstand the scrutiny of the public use requirement." 467 U.S. at 245. Section 402(d) does not authorize a "purely private taking." If Amtrak sought to take property solely to further the objectives of a private party, the ICC could not, and would not, authorize the transaction. But the ICC rejected respondent's contention in this case that the taking and reconveyance of its property were designed solely to further private aims of Central Vermont, and that conclusion is amply supported by the record. Pet. App. 41a-42a.

The transaction in this case allowed Amtrak to rehabilitate a rail line that was badly dilapidated, and to obtain from Central Vermont a guaranty of 20 years of proper maintenance and a commitment giving Amtrak the right to operate its trains at a reasonable compensation level. Moreover, Amtrak contributed $3.1 million towards the rehabilitation of the line that Congress specifically appropriated to revitalize the Montrealer. Pet. App. 41a-42a. The State of Vermont and the Commonwealth of Massachusetts supported the transaction before the ICC, as did all of the affected shippers. *Id.* at 85a. And the ICC specifically determined that the transaction was in the public interest.[15] In light of that record, respondent cannot sustain its claim that this transaction violates the Public Use Clause.

[15] The ICC considered and rejected respondent's claim that Amtrak had "abused the process available under § 402(d) by means of its dealings with [Central Vermont]." Pet. App. 42a. Prior to its approval of the instant transaction, the ICC also made clear that it "will not permit transfers that are not in the public interest and consistent with the relevant statutory criteria." *Id.* at 43a.

3. The ICC's factual findings adequately support its order

Finally, respondent contends that the ICC's order is infirm for lack of adequate factual findings. Resp. Br. 40-45. First, respondent claims that the ICC's findings are insufficient to establish that the property was "required for intercity rail passenger service." This argument, however, simply reformulates respondent's mistaken claim that, before permitting a condemnation-and-transfer transaction, the Commission must consider whether trackage rights, an easement, a lease, or some other lesser estate would suffice. Resp. Br. 43. As the ICC construed the statute, those findings were not necessary, and as Congress confirmed in ISBA, even when Amtrak's ultimate aim is use, not ownership, Amtrak may still condemn rail property if the ICC finds that the transaction will further the purposes of the Rail Passenger Service Act.

Second, respondent faults the ICC's consideration of the issue of whether respondent would suffer "significant impairment" of its common carrier functions as a result of the condemnation. 45 U.S.C. 562(d)(1)(A). As we explain in our opening brief (Pet. Br. 31-32), the ICC expressly conditioned this condemnation on a grant of trackage rights to respondent that ensured that respondent could serve its existing local customers. The ICC was entitled to find, and did find, that that agreement adequately protects respondent's ability to fulfill its common carrier obligations. Pet. App. 43a.

Third, respondent challenges the agency's conclusion that the parties were "unable" to reach agreement for the sale of the property. It is clear enough, however, that respondent told Amtrak in unqualified terms that it saw "no need to pursue the very com-

plex 'offer to purchase' " made by Amtrak, J.A. 60, and the "detailed history of [Amtrak's] dealings and negotiations with B&M over the Conn River Line" demonstrated that the parties' positions were unlikely to converge. The ICC permissibly concluded that the parties were unable to agree on a sale. Pet. App. 130a.

In any event, if the ICC's findings were not sufficient to support its order, or if the ICC erred in its interpretation of the criteria for establishing Amtrak's right to condemn the track at issue, the proper disposition would be to remand the case to the ICC for additional explanations, or for an evaluation of facts in light of the correct legal standard. See *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901); *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981).

* * * * *

For the foregoing reasons and the reasons set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

ROBERT S. BURK
General Counsel
Interstate Commerce Commission

JANUARY 1992

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* The Solicitor General is disqualified in this case.

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Nos. 90-1419, 90-1769

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.

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Amtrak is a congressionally created and federally subsidized corporation with the statutory mission of providing "cost-efficient . . . intercity railroad passenger service" (45

U.S.C. § 501(a)).[1] The line of track at issue in this case is essential to the operation of the *Montrealer*, a route Congress considered so important that it specifically appropriated funds for rehabilitation of that line. *See* Amtrak Br. 9.[2] The line needed rehabilitation because, as an arbitration panel found, respondent had breached its agreement to maintain the line (*see* Amtrak Br. 8 n.9), allowing it to deteriorate to a point where it could not be used for passenger service. The issue in this case is whether Amtrak could use its power under Section 402(d) to condemn the line and subsequently place it in the hands of an owner who would provide "a guaranteed 20 years of proper maintenance on the rail line, and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level." Pet. App. 42a.

Section 402(d) of the Act authorizes Amtrak to seek the conveyance of "property (including interests in property) . . . required for intercity rail passenger service." The ICC gave the phrase "property . . . required for" a natural meaning: a line of track is "property", and it is "required" if Amtrak intends to provide service over it. The Second Circuit (interpreting the same phrase in a parallel section

[1] Amtrak is, as respondent and the *amici* railroads repeatedly remind the Court, a private corporation. But it was created pursuant to the RPSA, 45 U.S.C. § 541, and its mission is defined by that statute. 45 U.S.C. § 501a. Six of its nine directors are appointed by the President, two are appointed by the Secretary of Transportation (as Amtrak's preferred stockholder), and the ninth is the president of Amtrak, selected by the Board. *See* 45 U.S.C. § 543. Amtrak receives federal operating subsidies and capital grants, and it is instructed to "[e]xercise [its] best business judgment in taking actions to minimize [such] subsidies . . . ." 45 U.S.C. § 501a(1). *See generally National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe R. Co.*, 470 U.S. 451, 454 (1985).

[2] Respondent concedes that Amtrak needed the "'use [of the B&M segment] in a condition permitting resumption of Montrealer service.'" Res. Br. 16, *quoting* Pet. App. 18a.

of the Act) and Congress (reacting to this case) both agreed with the ICC.

Respondent and the *amici* railroads argue for an unnatural and unworkable alternative reading: when Amtrak seeks the conveyance of a line of track, they say, the ICC must first determine whether Amtrak really "requires" the fee interest or could make do with something less. This reading of Section 402(d) would not give Amtrak an "election of remedies" (Pet. App. 39a), including the swift and sure remedy of condemnation, but instead would give it the right to a preliminary proceeding in which the ICC would attempt to determine the minimum interest that would meet Amtrak's needs. But this reading, which is contrary to an ICC interpretation that is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is unsupported by anything in the text, structure, purpose or legislative history of the statute before the 1990 Amendment and was flatly rejected by Congress in 1990.

I. THE COMMISSION'S INTERPRETATION OF THE PHRASE "REQUIRED FOR INTERCITY RAIL PASSENGER SERVICE" WAS CORRECT AND IS IN ANY EVENT ENTITLED TO DEFERENCE

All parties agree that the B&M segment, in a substantially upgraded condition, was essential to the provision of Amtrak's *Montrealer* service. The ICC ruled that, in order to obtain a property thus required for its intercity rail passenger service, Amtrak "is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads." Pet. App. 39a. The ICC recognized that because of B&M's past practices Amtrak would be required to spend on rehabilitation more than "$3 million in funds which have been appropriated specifically for its benefit" (Pet. App. 42a); the ICC noted that the proposed transaction would give Amtrak a 20-year guarantee of proper maintenance and a 20-year com-

mitment to a reasonable, predetermined compensation level for Amtrak operations (*id.*); the ICC held that Amtrak has an "election of remedies," Pet. App. 39a, and specifically "conclude[d] that Amtrak has demonstrated that it has not abused the process available under § 402(d)" (Pet. App. 42a).[3] It therefore expressly rejected respondent's contention that Amtrak should receive mere trackage rights from B&M under Section 402(a).[4]

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[3] There is no basis for respondent's occasional implication that Amtrak might, in some other case, make inappropriate use of its statutory powers. In addition to the Commission's general power under Section 402(d), Amtrak is subject to broad general oversight by the Executive Branch and Congress, particularly as to actions that may affect its continuing needs for substantial federal subsidies. And if, as here, Amtrak plans to convey part or all of the property to a third party, that reconveyance must, under the 1990 Amendment, be "found by the Commission to further the purposes of the Act." See Section 402(d)(1), as amended, Amtrak Br. 12a.

[4] Respondent repeatedly states that the ICC acted without any "evidentiary proceeding." *See, e.g.*, Res. Br. 2 n.1, 8, 9, 15 and 42. In fact, because of the rapid deterioration of the line and the statutory command to issue a final decision within 120 days, the ICC followed the "modified procedures" provided for by its Rules of Practice, 49 C.F.R. Part 1112. Pet. App. 124a, 133a. These procedures provide for discovery and submission of sworn written direct, reply, and rebuttal testimony. Parties may move to strike inadmissible evidence and may request cross-examination under special circumstances. Such a proceeding is certainly an "evidentiary" proceeding and has been held to constitute a full and fair hearing under the Administrative Procedure Act, 5 U.S.C. § 556(d). *Subler Transfer, Inc. v. United States*, 396 F. Supp. 762, 765-66 (S.D. Ohio 1975). *See also Laird v. Interstate Commerce Commission*, 691 F.2d 147, 154-55 (3d Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

In this case, with its application on April 4, 1988, Amtrak submitted sworn written testimony, which was subject to rebuttal by B&M. B&M filed a request that the Commission reject the application and had the opportunity to submit evidence in support of that request. In its first order, served on April 29, 1988, the Commission denied B&M's request on the basis of the submissions that had been made. Later decisions and findings of the Commission were based on these submissions and

Respondent rejects the ICC's interpretation and contends that "Amtrak has no power to take a property *interest* greater than that 'required' " (Res. Br. 15 (emphasis added)), so that if Amtrak seeks to condemn a line of track over which it intends to run trains, the ICC must conduct a proceeding in which it pares the fee interest down to whatever lesser interests it determines would suffice. To avoid the deference to the Commission required by the *Chevron* case, respondent and the *amici* railroads assert that the statute is "unambiguous" (Res. Br. 17-23; Amici Br. 4-5) on that point and make additional arguments based on supposed statutory structure, legislative history, other alleged statutory policies the Commission somehow missed, and purported constitutional problems. None of these contentions has merit.

A. *Language.* The words of Section 402(d)(1), read perfectly naturally, are entirely consistent with the ICC's interpretation. A line of track is "property"; a line of track on which Amtrak intends to run trains is "property . . . required for intercity rail passenger service," just as an office building might be found to be "required" for governmental offices, and therefore condemned in fee, even though other arrangements affording the government the use of the building might also suffice.

The parenthetical references to "interests" in property plainly *permit* Amtrak to seek less than the fee, but they do not (and certainly do not unambiguously) *require* Amtrak to seek only the minimum interest that might suffice to meet its needs. And the threshold proceeding envisioned by respondent, in which the ICC hears both sides and pares down Amtrak's request to the minimum interests in property the Commission thinks sufficient, is not even hinted at in the statute.[5]

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submissions filed by Amtrak and other parties at later stages of the proceeding.

[5] The proceeding respondent envisions would often be complex and

Nothing in the words of Section 402(d) before 1990 suggested that Amtrak could not condemn any interest in property that it did not intend to keep, and the 1990 Amendment now makes it perfectly clear that, to the contrary, Amtrak may intend a further conveyance as long as that transaction "is found by the Commission to further the purposes of the Act." There simply is nothing in the text of Section 402(d)(1) that precludes reading it to mean that Amtrak may condemn property it "requires" for use, not in order to keep the property but in order to make satisfactory arrangements for its future availability.[6]

Finally, our contention that the words of Section 402(d)(1) at the very least *permit* the interpretation adopted by the ICC is reinforced by the decision of the Second Circuit in *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484

protracted. For example, respondent suggests that the intentions of the pertinent parties would be relevant to Amtrak's needs, because Amtrak clearly should not be left "with nothing but a breach-of-contract action." Res. Br. 22 n. 10. Amtrak of course had just such a fear in this case, where as noted above respondent was in material breach of its maintenance contract.

[6] Respondent cites *United States v. Carmack*, 329 U.S. 230 (1946), and subsequent lower court cases for the proposition that a condemnation power granted to private parties must be narrowly construed. But the entity that orders the conveyance under Section 402(d) is the ICC, not Amtrak. Moreover, general canons of statutory construction must obviously yield to the responsible agency's interpretation of a specific statute. Finally, nothing in *Carmack* conflicts with the ICC's reading of Section 402(d) to grant Amtrak the power it exercised here. *Carmack* involved a taking by federal officers, which was sustained against the objection that the statutes did not authorize federal takings of property already being used for public purposes by a municipality. The Court distinguished grants of condemnation power to federal officers from grants to public utilities, saying that the latter "do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater powers." 329 U.S. at 243 n.13. This dictum was centrally addressed to the need for a clear expression before a private party will be permitted to prime other *governmental* uses; there is no such issue in this case.

U.S. 954 (1987). The court there construed the words "property . . . required for intercity passenger service," as they appear in a parallel provision of the RSPA (Section 305(d)(1)(B), governing condemnation of nonrail property) to allow Amtrak to condemn a fee interest which was then reconveyed, without inquiry into whether condemnation of an easement (the property interest Amtrak ultimately retained) would have sufficed. The court said that Amtrak need show only a "significant relationship" between the condemnation and the provision of passenger service. 822 F.2d at 1265. That decision, and Judge Ginsburg's concurrence below, surely demonstrate at least that the text is not dispositive in respondent's favor.

B. *Statutory Structure.* Respondent contends (Res. Br. 19) that the statute has a "simple, logical, and clear" overall structure under which Amtrak must use Section 402(a) if it requires only the "use" of tracks or other facilities and may use Section 402(d) only if it needs to make an "*acquisition* of property" (*id.* (emphasis in original)).[7] The Commission ruled, to the contrary, that the statute gives Amtrak an "election of remedies." Pet. App. 39a. We submit that the structure in fact favors the Commission's reading and that the Commission's reading is at the very least a "permissible" one. *Chevron*, 467 U.S. at 843 & n.11.

First, nothing in Section 402(a) or Section 402(d) suggests that either section is an exclusive remedy in any given situation, or that Section 402(d) is a remedy of last

[7] Amtrak would contend, of course, that it did "require" the "acquisition" of the property. Its whole experience over a period of years demonstrated that the line of track would not be adequately available for its use as long as it was still owned by B&M. But Amtrak was not obliged to demonstrate to the Commission that trackage rights would not suffice. Under the Commission's correct interpretation, since Amtrak plainly required the segment, it had an election of remedies, to be made in accordance with its judgment "depending on the type of service problems it encounters." Pet. App. 39a.

resort. Neither section makes any reference to the other, express or implicit, or posits in any way that the other must be unavailable before it can apply. Second, contrary to respondent's submission (Res. Br. 24-25), it is their reading, not the Commission's, that would make part of the statute superfluous. On the Commission's reading, usage rights under Section 402(a) will remain an important (indeed, almost always preferred) alternative to condemning property and paying just compensation under Section 402(d). On respondent's reading, it would be difficult (as demonstrated by respondent's struggle, Res. Br. 22) to find any meaningful application for Section 402(d), since that section would not be available unless Amtrak needs more than the use of property.

Respondent's arguments about "structure" also ignore the most important structural element. The condemnation power provided in Section 402(d) was obviously intended, as it usually is, to enable the condemnor (here, Amtrak) to move swiftly in situations, like the present, where service is suspended, property is deteriorating, and money is available. That is why Section 402(d)(2) says that the Commission shall expedite proceedings and in any event issue its order within 120 days after Amtrak's first filing; it is also why the section goes on to provide for conveyance prior to the determination of just compensation. Respondent's reading of the statute, under which the Commission would respond to Amtrak's application for the conveyance of a needed line of track by holding some sort of hearing on whether a lesser interest would suffice, is wholly inconsistent with this command for expedition.

C. *Legislative History*. Respondent argues that the "Commission's Construction Flies in the Face of the Legislative History." Res. Br. 28. But even if legislative history could make up for the failure of the statutory text to speak "directly . . . to the precise question at issue," *Chevron*, 467 U.S. at 842, it does not do so here. First, the premise of respondent's argument is that the examples

given in testimony and the Senate Report should limit the application of a statute whose language is broad. The Court has repeatedly rejected that use of legislative history, most recently in *Union Bank v. Wolas*, ___ U.S. ___, 60 U.S.L.W. 4043, 4045 (December 11, 1991): "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." (Citation omitted.)[8]

Second, respondent misses the significance of the lengthy excerpt it quotes (Res. Br. 29) from the Senate Report. The key statement is that condemnation power is needed because usage rights are not always "the most economical means by which Amtrak could fulfill its requirements . . . ." The objective reflected throughout the excerpt is to offset the weakness of Amtrak's bargaining position when (as here) its operating needs are site-specific. When Amtrak sought to obtain the use of a rehabilitated and maintained B&M segment at the lowest net cost to itself, it was doing exactly what Congress (as reflected in this excerpt and in the statutory sections discussed below at 10) wanted it to do.

Finally, the legislative history of Section 402(d) offers no support for the proposition that the phrase "property . . . required for intercity rail passenger service" is intended to state a substantial threshold requirement, forcing the ICC to determine in each case whether less than the fee interest would suffice. Indeed, the conference re-

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[8] Respondent implies (Res. Br. 28-30), without quite saying, that Section 402(d) was intended only to allow acquisition of terminals and other similar facilities and that (despite the breadth of the statutory word "property") the section does not apply to lines of track at all. If that is respondent's contention, then it is attributing to the statute an "unambiguous" meaning that is quite different from the unambiguous meaning found by the court of appeals. Moreover, the Commission flatly rejected this argument by B&M at the outset of this proceeding. Pet. App. 132a-133a.

port on the Amtrak Improvement Act, which first added Section 402(d), never mentions the phrase "required for intercity passenger service." It speaks only about property which Amtrak "needs", and says that "Amtrak's need" "would be deemed to be established" unless the subsection (A) and (B) findings were both made. Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2331 at 2338.

D. *Respondent's Policy Arguments.* Respondent (Res. Br. 26 *et seq.*), and its *amici* (Amici Br. 17-22), argue that the Commission's interpretation conflicts with ICC and congressional policies. Even if these arguments were a good deal stronger than they are, they would not substitute for statutory language speaking directly to the "precise question at issue": *Chevron*'s requirement of deference to the interpretation made by the responsible agency is at its strongest where questions of regulatory policy are presented. *See* 467 U.S. at 864-66. But, in fact, the policy arguments are without merit.

To begin with, respondent and its *amici* simply ignore the policies explicitly set forth in the statute directly involved in this case, the RPSA. That statute makes it clear that Congress expected Amtrak to arrange its affairs so as to provide service at the least cost to the United States and that Congress hoped Amtrak would receive private sector support, including "subsidies", in doing so. In Section 102 of RPSA (Amtrak Br. 1a-2a), Congress set the goals for Amtrak including "(1) Exercise of [Amtrak's] best business judgment . . . to minimize Federal subsidies. . . ."; "(2) Encouragement of State, regional, and local governments *and the private sector* to share the costs of operating rail passenger service . . . in order to minimize Federal subsidies. . . ."; "(7) Development of service on rail corridors, *subsidized by States or private parties, or both* . . . ."; and "(10) Encouragement of rail carriers to assist in improving intercity rail passenger service." (Emphasis added.) The partnership here among Amtrak, Central Vermont and the State of Vermont would appear to be precisely the kind of cooperation that Congress envisioned.

Respondent nevertheless argues that the present transaction violates a supposed policy against "cross-subsidization". In fact, there is neither any such policy applicable to this case nor any cross-subsidization here. To begin with, neither Section 402(d) nor Section 402(a)(1), the section providing for Amtrak to obtain trackage rights from freight railroads, mentions cross-subsidization.[9] Section 402(a)(1) provides that, where the Commission is required to fix compensation for trackage rights, the freight railroad shall be awarded "just and reasonable" compensation, and Section 402(d) provides that the condemnee railroad shall receive "just compensation", which B&M received here. Neither section says anything about the terms on which another railroad, like Central Vermont, may voluntarily deal with Amtrak.

In any event, there is no "cross-subsidization" here. B&M has received "just compensation", and Central Vermont voluntarily entered into arrangements economically satisfactory to it, which included Amtrak's contribution of $3.1 million towards the upgrading of a line over which Central Vermont had for decades operated its freight service. It may well be (as respondent suggests, Res. Br. 27) that Central Vermont was in a position to offer Amtrak

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[9] By instructive contrast, Subsection (2) of Section 402(a), which governs freight carriers' use of properties owned by Amtrak, *does* state that the Commission, in fixing compensation to be paid *to Amtrak*, "shall not permit cross subsidization . . . ." Amtrak Br. 6a-7a. It goes on to say that the freight railroad shall bear not only all of "the costs incurred by [Amtrak] solely for the benefit of that railroad" but also "a proportionate share [measured by relative use] of all other costs of providing services. . . ." *Id.* Subsection (1), governing compensation awarded to a freight railroad for Amtrak's use of its facilities, limits the circumstances under which Amtrak may be required to pay more than "incremental costs"; if Amtrak's failure to pay any share of fixed costs is a subsidy, it is one that Congress explicitly blessed.

better terms than B&M: Central Vermont wanted a well maintained Connecticut River Line for its own use, while B&M's parent appeared content to allow the Connecticut River Line to deteriorate. If so, the multi-party transaction here was fair to all concerned, made substantial economic sense, and (most importantly for present purposes) was thoroughly consistent with the letter and spirit of the statute.[10]

There is no warrant for respondent's speculation that in some future case Amtrak could, by threatening to use its Section 402(d) power, somehow bully a freight railroad to provide trackage rights on terms that are unfair to it or contrary to the statute. A freight railroad has not been treated unfairly or unlawfully if it is afforded the opportunity to obtain "just compensation" for its property. If another freight railroad, with its own incentives to maintain the property at a high level, is prepared to pay that amount and then to provide maintenance and usage rights on terms acceptable to Amtrak, a transaction transferring the property to that railroad promotes the goals of the RPSA. In any actual case, of course, the Commission (which expressly found that in this case Amtrak "has not abused the process available under § 402(d)" (Pet. App. 42a)) would have to find that the transfer to the other railroad in fact "further[s] the purposes of this Act." *See* Amtrak Br. 12a.[11]

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[10] Although the Interstate Commerce Act contains no explicit, general prohibition against cross-subsidies, respondent is correct that the Act has been construed by the Commission to preclude it from imposing an obligation on a carrier to cross-subsidize a shipper, another carrier or a transit authority, either through non-compensatory rates (49 U.S.C. § 10101a(10)), or through conditions to be imposed in merger proceedings. *See* Res. Br. 26-27. The voluntary arrangements among Amtrak, Central Vermont and the State of Vermont do not contravene any such policy.

[11] Here, Amtrak did not seek trackage rights from B&M at any price because its past experience raised doubts about B&M's willingness to honor its commitments, *see* Larson V.S., J. App. 33, and Amtrak did not want to be left with "nothing but a breach of contract action" (Res. Br. 22 n.10). In an attempt to suggest that the ICC believed B&M ownership would have been fully satisfactory, respondent and its *amici* repeatedly quote Judge Ginsburg's statement that ICC counsel "disavowed any doubt as to B&M's competence to maintain the track in question" (Pet. App. 27a). But Judge Ginsburg's comment omitted the fact, well known to respondent, that in the same colloquy ICC counsel expressed very considerable doubt about B&M's *willingness* to do so. *See Boston & Maine Corp., et al. v. Interstate Commerce Commission, et al.*, Nos. 88-1631, *et al.*, Transcript of Proceedings at 32-34 (D.C. Cir. January 18, 1990).

E. *The 1990 Amendment.* Respondent and the *amici* railroads have little to say about the 1990 Amendment, which would be dispositive of this case even if the court of appeals' initial decision had been correct. One express purpose of that amendment (obscured by respondent's startlingly truncated quotation of its sponsor, Senator Jeffords (*compare* Res. Br. 34 *with* Amtrak Br. 39)) was to reverse the initial result in this case. Its more general purpose (as is evident from its text and the existing statutory context to which it was added, as well as from its legislative history) was to make it clear that Amtrak may condemn property it intends to reconvey to a third party, as long as the ICC finds that the reconveyance "further[s] the purposes of the Act."[12] The amendment would have been wholly unnecessary if, as the court of appeals thought, it has no bearing on Amtrak's condemnation power and was intended only to confirm that Amtrak is free to transfer property that it changes its mind about after the condemnation.

One significance of the 1990 Amendment is that it is irreconcilable with the view that the existing words "prop-

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[12] The ICC, although it acted before the 1990 Amendment made this requirement explicit, did make a public interest finding here. It said: "Here, Amtrak has established that its interest in having the line conveyed [to itself and then to Central Vermont] is so that it may reinstitute its Montrealer passenger service—clearly a 'public purpose.'" Pet. App. 44a-45a.

erty. . . required for intercity rail passenger service" meant only those interests in property to which Amtrak needs to hold continuing title. At a minimum the amendment establishes that an intention to reconvey does not, as the court of appeals believed, demonstrate that Amtrak is seeking the conveyance of more than it "requires".

The *amici* railroads, in the one paragraph they devote to the amendment, concede that Congress was "apparently prompted by . . . concerns that the D.C. Circuit's first decision in this case absolutely foreclosed Amtrak from ever condemning an operating freight line in contemplation of reconveying that line to a third party." Amici Br. 16. They therefore abandon (*id.* 17) that portion of the lower court's decision on rehearing that stated the amendment "does not affect" its earlier construction of the "required for" language. Pet. App. 3a. The court of appeals and respondent should have done likewise.

F. *Constitutional Concerns.* Respondent and the *amici* railroads argue that the Commission's interpretation of Section 402(d) raises constitutional questions that could be avoided by substituting the court of appeals' interpretation for that of the Commission. But the supposed constitutional questions are without substance.

Both briefs argue that the Commission order permitting Amtrak's acquisition and reconveyance to Central Vermont of a fee interest in the B&M segment violated the "public use" requirement of the Fifth Amendment. *See* Res. Br. 36-40; Amici Br. 24-25, 28-30. But the relevant public purpose here was clearly stated by Congress: the provision of "modern, cost-efficient, and energy-efficient intercity railroad passenger service." *See* 45 U.S.C. § 501(a).[13] Amtrak's exercise of its Section 402(d) authority to acquire the B&M segment for purposes of reinstating *Montrealer* service manifestly served that public purpose, and the Commission so found. Pet. App. 44a-45a.[14]

[13] The public purpose of this transaction is evidenced by the fact that the three affected states—Vermont, Massachusetts and New Hampshire—all supported it, and substantial state and federal funds were appropriated in order to facilitate its consummation. *See generally* States' Br. 27 n.18.

Respondent argues that a taking of property from one private entity for reconveyance to another private entity without "changing the use to which the property is put" violates the Fifth Amendment. Res. Br. 37. But *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), forecloses the application of any such doctrine here. In that case, the housing authority condemned leased residential real estate, paid just compensation to the condemnee-lessors, and then sold the condemned real estate to the former lessees of the residences, without *any* change in the physical use of the property. *See id.* at 242-43. This Court unanimously upheld that action against a "public use" challenge.

This case involves much more substantial changes in use than *Midkiff*. Prior to the transaction, the condition of the B&M segment had deteriorated far below minimum suitability for high-speed passenger service. The transaction enabled Amtrak to render *Montrealer* service over track that had been rehabilitated to permit high speed passenger operations and would be well maintained for 20 years.

The *amici* railroads also argue that, under the Commission's interpretation, Section 402(d) is an unlawful delegation of federal regulatory authority to Amtrak. Amici

[14] Respondent's argument goes well beyond the view of the court of appeals, which plainly recognized that any use prescribed by Congress is a "public use". In its initial decision, the court said only that absent a "clearer statement" that Congress intended Amtrak to be able to reconvey condemned property, the Commission's interpretation gave rise to "at least colorable Fifth Amendment problems." Pet. App. 21a. On rehearing, after the 1990 Amendment supplied the "clearer statement," the panel majority did not suggest any continuing constitutional concern.

Br. at 23-24 & nn.19, 20.[15] But Amtrak's real area of discretion under the RPSA—to determine the routes over which it will provide its services—was not at issue below and is not before this Court. Amtrak's selection of a procedure to obtain the property needed to operate the routes is subject to the Commission's review of whether Amtrak has met the statutory requirements. *See* Pet. App. 40a ("Amtrak has met the statutory criteria for the institution of a proceeding under § 402(d) and, thus, is plainly entitled under the statute to a decision on the requested conveyance of the line."). And an Amtrak proposal to reconvey condemned property to a third party is subject to specific Commission review to determine whether it "further[s] the purposes of the Act."

II. THE ICC'S DECISION CONTAINS ALL OF THE FACTUAL DETERMINATIONS REQUIRED BY SECTION 402(d)

Respondent argues that the Commission did not adequately make three findings required by Section 402(d): (1) that the parties were "unable to agree" on the sale of the property; (2) that the property was "required for intercity rail passenger service;" and (3) that the condemnation would not significantly impair B&M's ability to carry out its obligations as a common carrier. In each case, respondent is actually just quarreling with the Commission's interpretation of the statute.

1. In its first ruling, the Commission briefly reviewed the parties' negotiations, noted that Amtrak had made a

[15] The *amici* cite *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), as instances in which "[t]his Court has . . . invalidated federal legislation granting governmental authority to private parties." Amici Br. 23-24. But the power to order a conveyance is vested not in any private party but in the ICC, subject to statutory instructions. The Commission's interpretation of the statute to give Amtrak an election of remedies, rather than to make Section 402(d) a remedy of last resort, was hardly an abdication of its responsibilities.

"valid offer to purchase" (Pet. App. 130a) that B&M said it saw "no need to pursue" (Pet. App. 131a), and squarely rejected B&M's argument that Amtrak had failed to show that the parties had been "unable to agree." *See* Pet. App. 130a; Amtrak Br. 11. The Commission reiterated this conclusion in its final decision. *See* Pet. App. 40a.

Respondent argues (Res. Br. 42) that Amtrak's $1,000,000 offer and B&M's rejection were inadequate, even after the prior course of dealings between them, to show that they were "unable" to agree. But contrary to respondent's implication, the Commission was not required to conclude that no agreement could ever have been reached, or to delay proceedings until the parties agreed they were at an impasse, or to decide who was at fault for the failure to agree. It read "unable to agree" to apply to a situation where a valid offer is made and not accepted. On that reading, which is clearly a permissible reading of the phrase, it made the only finding the statute required.

2. Respondent also argues (Res. Br. 42) that the Commission did not adequately find that the property was required for intercity rail passenger service. This argument merely repeats the quarrel respondent and the panel majority have with the Commission's interpretation of the phrase. For the Commission, it was sufficient that Amtrak indisputably "required" the B&M segment for purposes of running its trains and had elected the Section 402(d) procedure to make that line of track available. Respondent's interpretation, under which "required" means that the Commission must carve out and deny any part of the fee interest that it finds Amtrak does not "require", is not a demonstrably better reading, let alone one that the Commission was compelled to adopt.

3. Respondent also renews the argument that the Commission should have found that B&M had proved that its service would be significantly impaired, within the meaning of Section 402(d)(1)(A). This argument, which appears to

be moot,[16] was answered in our opening brief. Amtrak Br. 46-47. Respondent now argues (1) that the Commission never considered the "ramifications" of requiring B&M to take trackage rights from "its principal rival"; and (2) that the Commission should have imposed the terms at the time it ordered condemnation, rather than waiting (as it did at B&M's request, *see* Pet. App. 92a), for the parties to negotiate and submit their areas of disagreement for resolution in a separate phase of the proceeding, as occurred here, *see National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interest In Connecticut River Line in Vermont and New Hampshire*, 7 I.C.C.2d 539 (1990). Res. Br. 44. But the design of trackage rights to protect the service capabilities and competitive position of a railroad is plainly a matter for Commission expertise. Even if this were a live issue, the Commission's square ruling that B&M's "ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired" (Pet. App. 46a) would be dispositive.

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[16] As previously noted, the statute directs the Commission to find that Amtrak's "need" has been established unless the Commission makes *both* the "impairment" finding under Section 402(d)(1)(A) *and* a finding under Section 402(d)(1)(B) that adequate alternative property is available to Amtrak. Respondent appears to concede, contrary to the view of the court below (see Pet. App. 19a-20a), that the Commission could not have found that there was adequate "alternative property" within the meaning of Section 402(d)(1)(B) to meet Amtrak's needs: under the statute, such property would have to be property "available for sale on reasonable terms," and no one has suggested that any alternative line of track was available for sale here. Accordingly, the "impairment" finding is not logically necessary in this case.

CONCLUSION

For the foregoing reasons and those contained in petitioners' opening brief, the decision of the court of appeals should be reversed and remanded with instructions to affirm the Commission's decision with regard to the conveyance issues.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

NORTHEAST RAILROAD PASSENGER CORPORATION, *et al.*,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*
Respondents.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CONCERNED RAILROADS AS
AMICI CURIAE
IN SUPPORT OF RESPONDENTS
BOSTON AND MAINE CORPORATION, ET AL.

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INTEREST OF THE *AMICI CURIAE*

This case is an appeal from decisions of the United States Court of Appeals for the District of Columbia Circuit that reversed and remanded a decision of the Interstate Commerce Commission ("ICC" or "Commission") that had approved the condemnation and conveyance by the National Railroad Passenger Corporation ("Amtrak") of a significant portion of an operating freight line ("Conn River Line") from one private railroad ("B&M") to another ("Central Vermont") under section 402(d) of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 562(d).[1] The *amici* railroads include most of the private freight railroads over which Amtrak operates nationwide.[2] They have a direct interest both in the authority of Amtrak to condemn the entire fee interest in an operating freight line and in Amtrak's use of that authority to force a conveyance of a line from one owner to another.

Amtrak operates largely over private rail lines, and its trains constitute a relatively small percentage of

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[1] *See* Pet. App. 1a-27a, 29a-109a, 139a-145a. References to "Pet. App." in this brief are to the appendix to the petition in No. 90-1419. References to "Gov't Pet." and "Amtrak Pet." are to the petitions in Nos. 90-1769 and 90-1419, respectively. References to "Gov't Br." and "Amtrak Br." are to those parties' briefs on the merits. References to "States Br." are to the brief on the merits of respondents State of Vermont and Commonwealth of Massachusetts.

[2] The *amici* railroads file this brief by consent of the parties, pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk.

the traffic on those lines.[3] The railroads have cooperated with Amtrak to accommodate its passenger operations. Generally, Amtrak and the railroads have been able to reach voluntary agreements about the terms and conditions of operating rights ("trackage rights"). Where they have been unable to agree, the ICC has prescribed the necessary terms and conditions under section 402(a) of the RPSA, 45 U.S.C. § 562(a) (1988), which governs such disputes and provides standards for resolving compensation issues.[4] Until this case, Amtrak's condemnation authority under section 402(d) had never been used in a dispute about the terms and conditions of trackage rights, and, to the knowledge of the *amici* railroads, the suggestion had never been made that it could or should be so used, particularly as a device to transfer ownership of a rail line from one private freight railroad to another.[5]

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[3] The principal exception is the Northeast Corridor, which runs from Washington to Boston and carries over half of Amtrak's traffic nationwide. Amtrak owns the Northeast Corridor; several freight railroads also use the line under trackage rights agreements with Amtrak.

[4] Section 402(a)(1) addresses disputes concerning the terms and conditions of Amtrak's use of the railroads' lines; section 402(a)(2) addresses disputes concerning the railroads' use of Amtrak's lines.

[5] The only other time that Amtrak invoked section 402(d) was in 1986, after Consolidated Rail Corporation had filed a petition at the ICC to abandon a one-mile stretch of track in downtown Detroit. Amtrak and the City of Detroit had plans to relocate Amtrak's Detroit station to a site adjacent to the track, and Amtrak applied to condemn the track in order to preserve rail access to the site. Finance Docket No. 30898, *National R.R. Passenger Corp.—Conveyance of Conrail Line in Wayne County, MI* (decided Sept. 29, 1986). Amtrak withdrew its application in that case when it received assurances that the track would remain available for passenger service. *See* Pet. App. 39a.

The railroads' concern is not with the underlying dispute in this case but with the extreme statutory position that Amtrak and the federal petitioners have taken before this Court in order to avoid a remand to the ICC. Petitioners seek a determination that it does not matter whether Amtrak demonstrates, or the ICC finds, that condemnation of a railroad's operating rail line is, in the words of the statute, "required for intercity passenger rail service." Instead, they assert that section 402(d) gives Amtrak a largely unfettered choice to resolve a dispute about the terms and conditions of its trackage rights by forcing a sale of the entire fee interest in the line, through Amtrak, to the railroad's competitor.

The *amici* railroads submit this brief to demonstrate that no such interpretation of section 402(d) is appropriate or permissible.

SUMMARY OF ARGUMENT

Amtrak is not an agency or instrumentality of the federal government. Its eminent domain rights are entirely statutory and, as such, must be narrowly construed. This is particularly so in light of Congress' consistent denial of authority to the ICC to compel railroads to merge or sell their property against their will. *See St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 305-06 (1954). Ordinarily, the ICC is only empowered to approve *voluntary* conveyances of rail property between freight carriers. It may not force such conveyances. Even its authority to pre-

scribe more limited trackage rights is narrowly circumscribed. *See* 49 U.S.C. §§ 11103(a), 11125 (1988).

In this context, the proper interpretation of section 402 of the RPSA is clear. If Amtrak requires trackage rights over a railroad's line and is unable to reach agreement with the railroad on terms and conditions, the ICC's special prescription authority under section 402(a) provides a complete remedy. If Amtrak requires condemnation of a railroad's line and is unable to reach agreement with the railroad on terms and conditions for sale of its property, Amtrak may invoke the ICC's extraordinary condemnation powers under section 402(d).

The central issue in this case is whether, as a predicate to its invocation of section 402(d), Amtrak must affirmatively demonstrate, and the ICC must affirmatively find, that condemnation is "required for intercity passenger rail service." Amtrak asserted vigorously to the Commission that new ownership of B&M's segment of the Conn River Line was required if Amtrak's Montrealer service was to be reinstituted and successfully continued. But the ICC never made that finding. Instead, it held that the statute gave Amtrak a virtually unfettered choice of remedies in any dispute with a private freight railroad about the use of its track. So long as there was no significant interference with the railroad's ability to discharge its common carrier obligation, Amtrak could condemn the entire fee interest in the line and transfer it to another railroad more to Amtrak's liking.

The ICC's view of the statute cannot be reconciled with its plain language and intent. The ICC focused on the "need" presumption in the second half of section 402(d) and ignored the "required for intercity

passenger rail service" predicate in the first half. While the RPSA gives Amtrak considerable leeway to decide the best locations for its operations, Amtrak *is* required under section 402(d) to demonstrate, and the ICC *is* required to find, that a forced *sale* of a railroad's property is "required for intercity passenger rail service." If Amtrak's operational requirements can be met without recourse to the extraordinary remedy of condemnation, then section 402(d) cannot and should not be invoked. Assuming that Amtrak can successfully demonstrate that condemnation is required, if Amtrak further establishes that its presence will not interfere with a private freight railroad's common carrier obligation, then Amtrak is not further required under the "need" presumption of section 402(d) to look to alternative tracks or facilities to fulfill its needs.

This interpretation of section 402(d) is buttressed by the grave statutory and constitutional problems that are raised by petitioners' view of the statute. Petitioners acknowledge—indeed flaunt—that their interpretation would enable Amtrak to threaten railroads with loss of their property if they insist on their minimal compensation rights under section 402(a). The ICC went so far before the D.C. Circuit as to label Amtrak's brokering of its condemnation authority to Central Vermont as an "imaginative financing device." Pet. App. 15a. From the standpoint of statutory analysis, given that Amtrak was formed in significant part to halt the continued cross-subsidy of passenger service by the nation's railroads, which threatened to bankrupt the industry, Congress could not possibly have intended Amtrak to use section 402(d) to force carriers to provide service to Amtrak

below cost. Nor is it likely that Congress intended Amtrak to whipsaw the railroads by auctioning its condemnation authority to the highest bidder. Any such interpretation of the statute would collide not only with Congress' policy in the RPSA and the Interstate Commerce Act against the cross-subsidization of rail services, but also with Congress' policy in the Interstate Commerce Act against unnecessary regulatory interference in the business affairs of private rail carriers. *See General Am. Transp. Co. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990).

From a constitutional standpoint, petitioners' interpretation would render the statute vulnerable to attack under both the non-delegation doctrine and the "public use requirement" of the Fifth Amendment. Under the Fifth Amendment, the government may condemn private property and transfer it to another owner only if necessary and to the extent required to achieve a "legitimate public purpose." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Amtrak purports to recognize this principle, but claims that the statute gives it unfettered authority to decide whether a taking is necessary and, if so, whether that taking will encompass a fee simple interest or a lesser interest. Under this theory, the statute delegates the powers of the sovereign to a self-interested private party, and denies the ICC any effective authority to review the exercise of that power. To delegate such unchecked authority would be highly suspect under the Constitution, and, for that reason alone, the statute should not be construed to make such a delegation. *Cf. Carter v. Carter Coal*, 298 U.S. 238, 310-12 (1936).

ARGUMENT

The ultimate question in this case is whether Amtrak must demonstrate, and the ICC must find, that condemnation of a railroad's line is "required for intercity passenger service" before Amtrak may take that property and transfer it to another rail carrier under section 402(d) of the RPSA. Not only the plain language of the statute, but also basic canons of statutory construction require an affirmative answer to this question. As explained in Part A below, petitioners' contrary interpretation violates the precept that statutes conferring eminent domain powers are in derogation of common law property rights and should be narrowly construed. *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983). As explained in Part B, petitioners' contrary interpretation does not meet the requirements that individual provisions of a statute be interpreted so that they all have meaning, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), and that closely related statutes such as the RPSA and the Interstate Commerce Act be construed harmoniously, especially where they embody a common objective such as the elimination of cross-subsidies. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Finally, Part C demonstrates that petitioners' contrary interpretation violates the well-established principle that statutes should be construed so as to avoid constitutional issues. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980).[6]

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[6] Petitioners attempt to avoid these principles by invoking *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

A. Amtrak's Condemnation Authority Must Be Strictly Construed; Petitioners' Interpretation Of Section 402(d) Of The RPSA Cannot Be Reconciled With Its Plain Language And Intent

Because the power of eminent domain derogates common-law property rights, any statute granting such power must be strictly interpreted against the condemning party and in favor of the owner of the property sought to be condemned. *See* N. Singer, 3 *Sutherland on Statutory Construction* § 64.06 (4th ed. 1986); *see also Norfolk Redevelopment & Housing Auth.*, 464 U.S. at 35-36 (common-law property rights may not be deemed repealed except by "clear and explicit" statutory language); *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904) (strict

467 U.S. 838, 842-45 (1984), and arguing for deference to the ICC's interpretation of section 402(d). Gov't Br. 16-18; Amtrak Br. 21-22, 37. Yet *Chevron* itself endorses continued use of the "traditional tools of statutory construction." *Id.* at 843 n.11. This is especially appropriate here, since the ICC never addressed the meaning of "required for intercity passenger rail service." Whatever deference might be due a reasoned interpretation of that language, the Court need not defer to a non-interpretation. Deference is particularly inappropriate here because, although the agency's interpretation raises serious constitutional questions, the ICC has admitted that it has no expertise or authority to decide constitutional issues. Pet. App. 44a.

Chevron poses no other barriers to this Court's undertaking an interpretation of the statute. This Court need not decide what quantum of evidence will meet the "required for intercity passenger rail service" test in order to find that it is patently unreasonable for the ICC either to ignore the test altogether or implicitly to read "required" out of the statute. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987); *see also* C. Sunstein, "Law and Administration After *Chevron*," 90 *Colum. L. Rev.* 2071, 2105-15 (1990).

construction required because eminent domain "subverts the usual attributes of the ownership of property"). Where a private or quasi-public entity seeks to exercise eminent domain power, this rule is coupled with the requirement that grants of power to corporations be narrowly construed. *See Sutherland on Statutory Construction, supra*; *see also United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (utility's power of eminent domain limited to powers "expressed or necessarily implied").

Amtrak is *not* an "agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541 (1988). It is a common carrier subject both to the provisions and policies of the RPSA and to those of the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1988), unless expressly excepted. 45 U.S.C. § 546(a) (1988). It has no condemnation power except that provided by statute, and that power must be strictly construed to encompass only what the statute confers. *See National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 & n.3 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) (construing Amtrak's authority to condemn non-rail property).

Amtrak's power to condemn rail property requires particularly close construction. Railroads must invest enormous amounts of private capital in track, roadbed, and equipment in order to provide freight service, and Congress has "consistently and insistently" denied the ICC the authority to compel railroads to merge or to sell their property against their will. *St. Joe Paper*, 347 U.S. at 305-06; *see also Illinois Cent. R.R. v. United States*, 263 F. Supp. 421, 435 (N.D.

Ill. 1966), *aff'd*, 385 U.S. 457 (1967) (per curiam). The ICC's role has been to approve or to disapprove mergers or sales of property by one carrier to another which have been *voluntarily* agreed to by the railroads involved. 49 U.S.C. § 11343 (1988). Even in the more limited area of trackage rights, the ICC's authority under the Interstate Commerce Act to order one carrier to permit another to operate over its tracks is quite limited. Only in emergencies or within terminal areas may the ICC impose involuntary trackage rights arrangements on a carrier. 49 U.S.C. §§ 11103(a), 11125.[7] *See Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982); *Boston & Me. Corp. Trackage Rights over Conrail*, 360 I.C.C. 239, 241 (1979).

In this context, the powers granted Amtrak under section 402 of the RPSA, even as narrowly construed, are truly exceptional. If Amtrak is unable to reach voluntary agreement with a railroad regarding the use of its track and other facilities and the provision of services, Amtrak, under section 402(a), may obtain

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[7] The Commission will not impose involuntary trackage rights on a carrier under 49 U.S.C. § 11103(a) (1988) even within a terminal area except as "a remedy of last resort," where no less intrusive remedy is adequate "to remedy or prevent anticompetitive conduct on the part of the carrier." *Shenango, Inc. v. Pittsburgh, C. & Y. Ry.*, 5 I.C.C.2d 995, 1000-02 (1989). As the Commission stated in that case:

> [The owner of terminal facilities] has invested in and owns these facilities, and depriving it of the right to use them without good cause would undermine the incentive for private investment and ownership of the rail system contrary to the national transportation policy [49 U.S.C. § 10101a (1988)].

Id. at 1002.

a prompt order from the ICC requiring the railroad to provide trackage rights and setting the terms and conditions. Amtrak may be required to pay as little as the avoidable cost of its use of the track and the services it receives.[8] Further, under section 402(e)-(g), 45 U.S.C. § 562(e)-(g) (1988), insofar as it is practicable and Amtrak is prepared to cover the cost "pursuant to an agreement" or as "determined by the Commission in a proceeding pursuant to subsection (a)," Amtrak's passenger trains must be accorded preference over the owner's freight trains, must be permitted to operate at accelerated speeds, and must be permitted to operate on the schedule preferred by Amtrak.

By and large, since 1970, Amtrak and the freight railroads have succeeded in reaching voluntary agreements regarding Amtrak's operations over their lines. Where they have not, Amtrak has not hesitated to invoke its powers under section 402(a) to have the ICC order that the necessary trackage rights services

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[8] *See, e.g.*, Finance Docket No. 30426, *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act* (decided July 5, 1985) at 3, *aff'd sub nom. Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986); *see also* H.R. Rep. No. 415, 93d Cong., 1st Sess. 11 (1973) (term "incremental" in section 402(a)(1) is equivalent to "avoidable").

In contrast to the avoidable cost standard under section 402(a)(1) for Amtrak's use of the railroads' lines, under section 402(a)(2) a freight railroad using Amtrak's lines must pay not only the avoidable costs of its use but also "a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of [Amtrak] and such freight railroad." 45 U.S.C. § 562(a)(2); *see also Costing Methodologies for the N.E. Corridor: Commuter Serv.*, 367 I.C.C. 192 (1983).

be provided.[9] The issue here, given Congress' obvious intent that section 402(a) govern disputes about trackage rights and Congress' strong policy against forced sales of rail lines, is whether Congress intended Amtrak's condemnation authority under section 402(d) to be interpreted to provide Amtrak virtually unbridled discretion to resolve a trackage rights dispute by forcing the owner of the line to convey its property to a competitor willing to offer Amtrak better terms.

The statutory interpretation issue is framed by the first few lines of section 402(d)(1):

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property, including interests in property . . . *owned by the railroad and required for intercity rail passenger service*, [Amtrak] may apply to the Commission for an order *establishing the need of [Amtrak] for the property at issue* . . . .

45 U.S.C. § 562(d) (emphasis added). The section goes on to establish a presumption that Amtrak's "need" for the property at issue is established unless the condemnation will "significantly impair" the railroad's ability to discharge its common carrier obligation *and* suitable alternative property is "available for sale on reasonable terms" to Amtrak or can be obtained by use of Amtrak's authority to condemn non-rail property. *Id.*

Only if the proposition is established that condemnation is "required for intercity passenger rail service," did Congress intend by this "need" presumption

[9] *See* States Br. 26 n.20 (listing representative cases).

to limit any second-guessing by the freight railroad or the ICC about whether Amtrak had chosen the most appropriate property to condemn: detailed scrutiny would be necessary only where the original owner presents evidence showing that the taking would impair its ability to meet its common carrier obligation. Absent such a showing, the ICC need not investigate whether alternative property is available.[10]

Petitioners argue that the "needs" test stands by itself and that its satisfaction begins and ends the ICC's inquiry. Under their theory, Amtrak can condemn the fee interest in a rail line and transfer it to a new owner willing to pay for the privilege simply by making arrangements for a railroad that has lost its property to obtain limited trackage rights from the new owner. And what of the statutory predicate that the property to be condemned be "required for intercity passenger rail service?" Petitioners argue that this language really does not mean what it says. They suggest that "required for" be read out of the statute in favor of "useful" or "in connection with." Gov't Br. 17; Amtrak Br. 30 n.20.

[10] This reading of the "need" presumption is consistent with the ICC's reading of the "necessary to carry out the purposes of this Act" standard by which the ICC determines, under section 402(a)(1), whether Amtrak's request for the prescription of trackage rights over a particular line is justified. *See, e.g.*, Finance Docket No. 31895, *National R.R. Passenger Corp.—Section 402(a) of the Rail Passenger Serv. Act—Order to Require Serv. & Set Compensation Terms* (decided June 19, 1991) (refusing to "second-guess, or substitute our judgment for, Amtrak's business judgment" in deciding to operate particular trains over particular routes); Finance Docket No. 31306, *Amtrak & Wisconsin Cent. Ltd.—Use of Tracks & Facilities & Establishing Just Compensation* (decided July 29, 1988) (same).

Amtrak's strained construction of "required for intercity passenger rail service" is belied by its own opening position in the agency's proceedings. From the outset, Amtrak claimed that it had been "compelled to discontinue" its Montrealer service and it requested "that the Commission institute a proceeding under section 402(d) for the forced conveyance of this line to it so that passenger service may be resumed over the line." Pet. App. 122a. When B&M filed a petition to convert Amtrak's application for condemnation under section 402(d) to an application for prescribed trackage rights and services under section 402(a), the ICC rejected that petition on the ground that "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a. Even the Commission's final decision in the case began with a recitation of Amtrak's claim in this "extraordinary proceeding" that "it has exhausted all alternatives to condemnation and has found it necessary to resort to the condemnation powers under § 402(d) in this case." Pet. App. 39a.

In short, both Amtrak and the Commission clearly recognized the importance of establishing, as a predicate for Amtrak's section 402(d) application, that condemnation of B&M's property was *required for*—not related to or convenient for—intercity passenger rail service. But the ICC never came to grips with its obligation actually to weigh the evidence and make that finding *itself*. The closest the ICC even came to addressing the point was the following cryptic com-

ment in response to B&M's argument that divesting B&M of ownership was not required:

> [S]ince § 402(a) provides for trackage rights, § 402(d) must have been intended to provide more. We find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line. We find no abuse of § 402(d) processes here.

Pet. App. 43a.

The D.C. Circuit found, unanimously, that this was not enough and so should this Court.[11] We will have more to say below about "abuse" of section 402(d) processes. The point here is that the statute itself contains an express barrier to any abuse. If the ICC *weighs the evidence* and makes a *reasoned finding* that condemnation of a railroad's operating freight line is "required for intercity passenger rail service," then and only then may it proceed to assess whether Amtrak's need for that particular line should be deemed established.

Petitioners suggest that this reading of "required for intercity passenger rail service" would make the "need" determination redundant. Gov't Br. 20; Amtrak Br. 21. There is no such redundancy. The RPSA gives Amtrak considerable leeway to decide where and how to operate. *See* note 10, *supra*. The "need" presumption in section 402(d) reflects that policy of

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[11] While the majority and concurring opinions below differed in their reading of the findings required under the "need" presumption of section 402(d), they were unanimous that the ICC must find that condemnation is "required for intercity passenger rail service" before even reaching the "need" presumption. Pet. App. 3a-4a, 18a, 25a-26a.

not second-guessing Amtrak's business judgment about the best locations for its operations, absent exceptional circumstances. But that deference need not and does not extend to Amtrak's choices between condemnation and less intrusive means of meeting its presumed needs. Condemnation of the entire fee interest in an operating freight line is a far cry from trackage rights for a limited number of passenger trains. Nothing in the "need" presumption absolves the ICC of its responsibility to determine that condemnation of the entire property interest Amtrak says it needs is "required for intercity passenger rail service."

By the same token, nothing in Congress' 1990 amendment to section 402(d) eliminates the statutory predicate that any property condemned be "required for intercity passenger rail service." That amendment makes clear that *if* the criteria of section 402(d) are otherwise met, Amtrak "may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." *See* Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658. This amendment was apparently prompted by congressional concerns that the D.C. Circuit's first decision in this case absolutely foreclosed Amtrak from ever condemning an operating freight line in contemplation of reconveying that line to a third party.[12] On rehearing, the court

[12] There were no hearings and there are no committee reports regarding the amendment. The only congressional commentary is a statement read into the record on the Senate floor on behalf of Senator Jeffords of Vermont. It makes clear that Senator Jeffords was extremely concerned about the Montrealer service and desired to overturn the D.C. Circuit's decision insofar as the court held that Amtrak had no authority to condemn rail property with the intention of reconveying the property. 136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990). The amendment accomplishes that purpose by permitting reconveyance when the other statutory standards are met. The ICC still has the responsibility, however, to determine that condemnation is "required for intercity passenger rail service" and, if so, that the "need" presumption applies. In addition, under the amendment, the ICC must find that Amtrak's particular reconveyance plans "further the purposes of [the RPSA]."

of appeals certainly recognized that condemnation followed by a reconveyance was permissible in appropriate circumstances. As the court made clear, however, the amendment did not affect its original determination that the ICC had failed to make the findings required by section 402(d) as the predicates to approving condemnation in the first place.

B. Petitioners' Interpretation Of Section 402(d) Would Violate Strong Congressional Policies Against Cross-Subsidization Of Rail Services And Against Unnecessary Regulatory Interference In Business Relations Between Rail Carriers

The D.C. Circuit's strict construction of section 402(d) was influenced by its concern that Amtrak's construction would promote cross-subsidization of rail services and the brokering of Amtrak's condemnation rights, contrary to Congress' intent. Pet. App. 14a-15a, 17a-18a, 22a-23a. The court's concern was well-founded. Amtrak is not a freight railroad, and it is not authorized to provide freight service. 45 U.S.C. §§ 541, 545(a) (1988). Condemning an operating freight line and transferring it to another private freight railroad, unless "required for intercity passenger rail service," creates an open conflict with the policies and

procedures of the Interstate Commerce Act, which petitioners cannot explain away.

As noted earlier, Congress has consistently denied the ICC authority to require one railroad to sell its property to another against its will. Thus, all of the procedures in the Interstate Commerce Act for ICC review of inter-carrier transfers assume *voluntary* agreements between the carriers about the terms and conditions of the transaction.[13] The ICC *never* sets the price for the sale of the fee interest in an operating rail line from one freight railroad to another.[14] If the railroads are unable to reach agreement on a

[13] Congress' policy against unnecessary regulatory interference in the business relations of railroads is even stronger today than in years past. In the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), Congress extensively amended the Interstate Commerce Act in order to free the railroads from unnecessary and counterproductive government regulation. *See* Staggers Act, § 2 (Congressional Declaration of Findings) ("(3) today, most transportation within the United States is competitive; (4) many of the Government regulations affecting railroads have become unnecessary and inefficient; . . . (9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential. . . ."); 49 U.S.C. § 10101a(2) (requiring the ICC to "minimize the need for Federal regulatory control over the rail transportation system"); 49 U.S.C. § 10505 (1988) (giving the ICC broad authority and duty to exempt rail matters from regulation); H.R. Rep. No. 1430, 96th Cong., 2d Sess. 89, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4120; S. Rep. No. 499, 94th Cong., 2d Sess. 10-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 23-25.

[14] *Cf.* 49 U.S.C. §§ 10905, 10910 (1988) (providing procedures for persons to subsidize or purchase a line in the context of abandonment or discontinuance of rail service).

fair price, there is no sale. Just as any other private business, a railroad is not required to relinquish control of its assets to a competitor unless the parties agree to a mutually advantageous price.

In this case, Central Vermont made an offer to buy B&M's segment of the Conn River Line, which B&M rejected. Pet. App. 131a. The acquisition of that segment would give Central Vermont control of the entire line, which B&M deemed both a competitive threat and a valuable right. Presumably, condemnation of B&M's line would not have been necessary if Central Vermont had been willing to pay B&M what B&M considered a fair price for control of the line. The ICC would have exempted such a voluntary transaction from review under the Interstate Commerce Act, *see* 49 U.S.C. § 10505; Pet. App. 81a-85a, and Amtrak could then have had the trackage rights it says it wanted with Central Vermont.[15]

What troubled the D.C. Circuit, and what troubles the *amici* railroads, about requiring B&M to sell its segment of the Conn River Line to Central Vermont for "just compensation" is that that amount was obviously less than B&M thought the property was worth and may well have been less than Central Vermont was willing to pay in an arms' length transaction.[16] By brokering its condemnation authority to

[15] Of course, Central Vermont might not have been willing to make the same arrangement with Amtrak if Central Vermont had had to pay a market-based price to B&M. In that case, however, Amtrak would always have had recourse to section 402(a) to obtain trackage rights for as little as the avoidable cost of its operations.

[16] Although "just compensation" is frequently equated with

Central Vermont, Amtrak is in a position to receive trackage rights from Central Vermont on better terms than it could have obtained from either Central Vermont or B&M under normal RPSA and Interstate Commerce Act procedures. Furthermore, if the Court determines that the statute permits Amtrak to engage in such brokering anytime it decides it "needs" a line—*i.e.*, regardless of whether condemnation is *required* for intercity passenger rail service—then Amtrak will be in a position to obtain better terms than it could obtain under section 402(a) without even going through condemnation procedures. Any time Amtrak and a railroad might disagree about the costs of Amtrak's operations, Amtrak could threaten to bypass the procedures of section 402(a) and use section 402(d) to condemn the line and reconvey it to one of the railroad's competitors.

The Court does not need to speculate about Amtrak's willingness to use such a threat. Petitioners have already argued to the Court that they believe Amtrak needs a loose reading of section 402(d) in order to give it "leverage" over the freight carriers. Gov't Pet. 27; Amtrak Pet. 27-28. Since Amtrak already has "leverage" under section 402(a) promptly to obtain operating rights for as little as the avoidable cost of its operations, petitioners can only be suggesting that Amtrak requires "leverage" to obtain operating rights below cost.

market value, in fact it typically does not reflect the value of the property on the open market, but only the "loss" to the owner. *See United States v. Miller*, 317 U.S. 369, 375 (1943). It is precisely because the value to the taker is excluded altogether from the "just compensation" calculation that private entities are motivated to seek eminent domain rights. *See generally* R. Epstein, *Takings—Private Property and the Power of Eminent Domain* 162-66 (1985); T. Merrill, "The Economics of Public Use," 72 *Cornell L. Rev.* 61, 85-88 (1986).

The D.C. Circuit quite properly recognized that permitting Amtrak to use the threat of condemnation to pressure railroads into providing services to Amtrak at no cost or below cost would openly conflict with Congress' strong policy against cross-subsidization. It also recognized that allowing Amtrak to broker its condemnation powers would result in another form of cross-subsidy, since Amtrak would be in a position to extract, in the D.C. Circuit's words, at least part of the "premium" that Central Vermont might otherwise have paid for control of the line. Pet. App. 22a-23a.

Petitioners' suggestion that the RPSA embodies no policy against cross-subsidization, Gov't Br. 21 n.16; Amtrak Br. 23, is wrong. The RPSA was passed in substantial part to divorce passenger operations from freight operations because Congress recognized that passenger services could not continue to be subsidized by freight railroads,[17] and section 402(a) expressly imposes an incremental cost standard to prevent freight railroads from being required to cross-subsidize Amtrak's passenger operations, *see* note 8, *supra*. In any event, there is no debate that the Interstate Commerce Act contains a strong policy against cross-subsidization, which is applicable both to Amtrak, 45 U.S.C. § 546(a), and to the freight railroads, 49 U.S.C.

[17] *See* H.R. Rep. No. 1580, 91st Cong., 2d Sess. 1-4, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4735, 4735-38; *see also* H.R. Rep. No. 1182, 95th Cong., 2d Sess. 6-9, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2313, 2314-16.

§ 10501(a) (1988). *See generally General Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599, 606-11 (1987), *aff'd sub nom. General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990) (reviewing 4-R and Staggers Act provisions and legislative history mandating the elimination of noncompensatory rates and discouraging cross-subsidization between rail services and between railroads); *Illinois v. ICC*, 722 F.2d 1341, 1347-48 (7th Cir. 1983) (same).

There is also no debate that the Interstate Commerce Act embodies a strong policy against unnecessary regulatory interference with inter-carrier business dealings.[18] There is no regulatory interference with a private railroad's business more intrusive than condemnation—particularly when a railroad's property is condemned for the use of its competitor—and there is no greater cause for judicial concern that the policies and procedures of the Interstate Commerce Act are not sacrificed unnecessarily. Given that the policies and procedures of the RPSA and the Interstate Commerce Act can be harmonized by giving the "required for intercity passenger rail service" predicate of section 402(d) its logical meaning, there is no basis for adopting petitioners' strained interpretation. *See generally Morton v. Mancari*, 417 U.S. at 551.

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[18] Any doubt in that regard was laid to rest by Congress' passage of the 4-R and Staggers Acts. *See* note 13, *supra; see also Pittsburgh & L. E. R.R. v. RLEA*, 491 U.S. 490, 510-11 (1989); *ICC v. Texas*, 479 U.S. 450, 459-61 (1987).

C. Petitioners' Interpretation of Section 402(d) Would Create Serious Constitutional Problems

A basic rule of statutory construction is that a statute should be construed so as to avoid constitutional infirmities. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); *Industrial Union Dep't*, 448 U.S. at 646. The corollary to this rule is that " '[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' " *Rust v. Sullivan*, 500 U.S. ___, 111 S. Ct. 1759, 1771 (1991) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

The court of appeals interpreted section 402(d) in accordance with these principles. Pet. App. 21a. Petitioners now argue that the court's constitutional concerns are "illusory," Gov't Br. 23 n.19; Amtrak Br. 42-43, but they continue to assert that the statute gives Amtrak sole authority to determine whether a taking of rail property is "required for intercity rail passenger service." Gov't Br. 17; Amtrak Br. 28, 30 n.20. They also claim that it is solely within Amtrak's discretion to choose between condemnation of a fee simple interest under section 402(d) and other less intrusive remedies. Gov't Br. 14; Amtrak Br. 19.

Two separate lines of constitutional authority converge here to preclude petitioners' interpretation. First, the Constitution prohibits the delegation of regulatory authority to private businesses or associations. This Court has twice invalidated federal legislation granting governmental authority to private parties. *Carter*, 298 U.S. at 310-12 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42

(1935). The Court held that delegation of coercive authority to private parties is "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter*, 298 U.S. at 311. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." *Id.*; *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143-44 (D.C. Cir. 1984).[19]

Second, the Fifth Amendment allows property to be taken only for a "public use." U.S. Const. amend. V; *Hawaii Housing Auth.*, 467 U.S. at 241 (citing, *inter alia*, *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)); *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930). A "purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government

[19] This Court has condemned private policy-making in a variety of other contexts as well. *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (striking down a zoning ordinance under the Due Process Clause of the Fourteenth Amendment on the ground that it conferred the government's authority on private interests); *Eubank v. Richmond*, 226 U.S. 137 (1912); *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975) (upholding a delegation to Indian tribes of authority to regulate liquor sales on Indian lands, emphasizing that Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory" and therefore "are a good deal more than 'private voluntary organizations' "); L. Tribe, *American Constitutional Law* § 5-17, at 369 (2d ed. 1988).

and would thus be void." *Hawaii Housing Auth.*, 467 U.S. at 245.[20]

Petitioners' interpretation of section 402(d) runs squarely into both of these rules. It would delegate to Amtrak the authority to take property already dedicated to rail service and transfer it to a competitor of the original owner even if the taking does not serve a "legitimate public purpose." Of course, when a *government agency* is authorized to exercise the power of eminent domain, its decisions to take specific parcels of land are assumed to serve the "public purpose" identified in the applicable statute, and the judicial role in individual cases is limited. *See Berman v. Parker*, 348 U.S. 26, 33-36 (1954); *United States ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546,

[20] Prior to the decision in *Carter*, 281 U.S. at 311, this Court held that Congress could grant eminent domain power to private corporations. *See Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641 (1890). In the statutes initially examined by this Court, however, Congress itself identified the property to be taken in precise geographic terms and specified the public uses necessary for the property. In addition, private corporations that were granted eminent domain powers generally were prohibited from delegating that authority to other entities. *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 594, 598, 600 (1904). Congress later granted broader condemnation powers to a limited number of highly regulated public utilities, but provided for detailed review by a federal agency. Such utilities were typically required to obtain a federal certificate of public convenience and necessity for the project in question. *See Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 646 (5th Cir. 1950). To our knowledge, this Court has never considered the constitutional implications of a federal statute allowing a private corporation to exercise virtually unfettered power of eminent domain on behalf of other private corporations.

551-53 (1946). Where the legislature authorizes a *private corporation* to exercise the power of eminent domain, however, compliance with the "public use" requirement must be reviewed more carefully by the responsible agency and the courts. *See United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681 (1896); *Two Parcels of Land*, 822 F.2d at 1265; *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 688 F. Supp. 1245, 1249 (N.D. Ohio 1988) (citing *United States v. Certain Parcels of Land*, 215 F.2d 140, 148 (3d Cir. 1954)). Private corporations such as Amtrak may not exercise independent regulatory authority, let alone an essentially unchecked power of eminent domain. At the very least, the decisions of such corporations must be subject to especially careful administrative and judicial review.

In essence, it is the adequacy of the agency's oversight that is at issue in this case. Section 402(d) of the RPSA provides that if certain requirements are satisfied, Amtrak may condemn private property already dedicated to rail service and then convey that property to a competitor of the original owner. Under this extraordinary provision, it is especially critical that the ICC and, if necessary, the courts, ensure that the initial taking is required in order to achieve a "legitimate purpose of government." *Hawaii Housing Auth.*, 467 U.S. at 241; *Cincinnati*, 281 U.S. at 447. Authority to decide this question cannot be delegated solely to self-interested private parties such as Amtrak or Central Vermont.

In this case, the court of appeals was justifiably concerned that under the ICC's approach, Amtrak had virtually unchecked condemnation authority. The ICC itself indicated to the court that Amtrak could use

its authority as an "innovative financing device." The federal petitioners claim that the ICC can prevent Amtrak from "abusing" its authority under section 402(d), Gov't Br. 22-23, 35, but it is not clear what petitioners mean. If it is permissible for Amtrak to use its condemnation authority solely to raise capital or to obtain operating subsidies, Amtrak effectively may be able to sell its statutory condemnation authority to the highest bidder.[21] Even if the existing owner of a rail line is perfectly capable of upgrading and maintaining the line for passenger operations, the ICC's approach does not prevent Amtrak from forcing a transfer to a new owner who has "not contributed in money, services, negotiations, skill, forethought or otherwise to the development" of the line in question. *Thompson*, 300 U.S. at 78.[22]

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[21] The federal petitioners suggest that the ICC has inherent power to reject abusive applications under section 402(d) and that that power was made explicit when Congress conditioned reconveyances upon an ICC finding that the conveyance "further the purposes" of the RPSA. Gov't Br. 22 & n.17. But the ICC appears to believe that any condemnation scheme in which Amtrak has a "financial stake" and a "voice" is not abusive. Pet. App. 41a-42a. If that is the ICC's view—it made no finding otherwise—then the ICC's "inherent power" could not be relied upon to stop Amtrak from brokering its condemnation authority any time it detected the opportunity for a financial gain.

The federal petitioners also suggest that the ICC can prevent any abuse by exercising its authority under 49 U.S.C. § 11343 to review conveyances between railroads. Gov't Br. 23. But, as discussed earlier, that section is designed for *voluntary* conveyances between freight carriers. Under that provision, the ICC does not, and did not in this case, determine whether *condemnation* to force a transfer between freight carriers is justified.

[22] The court of appeals undoubtedly recognized that since Amtrak could receive below-cost trackage rights in transactions of

Ultimately, the court of appeals sought to interpret section 402(d) so as to ensure that any taking of private property by Amtrak would serve a "legitimate public purpose." It was partly for that reason that the court construed section 402 "to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or using its subsection (a) power." Pet. App. 3a. By denying to Amtrak an unfettered "election of remedies," the court of appeals did not "nullify" the statutory provisions enacted by Congress, as petitioners now claim. Gov't. Br. 14. The court simply read into the statute the safeguards necessary to preserve its constitutionality. The extraordinary remedy of allowing Amtrak to condemn an existing railroad's

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this type, Amtrak was not in a position to make an objective decision on whether the taking was necessary in order to achieve a public purpose. Pet. App. 14a-16a.

At the very least, Amtrak's use of its eminent domain authority as an "innovative financing device" requires close scrutiny under the Fifth Amendment. As Professor Tribe has pointed out, the requirement that the government pay just compensation has indirectly served the function of assuring that particular takings do "indeed redound to the public benefit." L. Tribe, *supra*, § 9-2, at 589. "The public's willingness to pay, expressed through the legislative process," serves as indirect proof that "the public [has] in fact been the beneficiary of what otherwise appear[s] to be a forbidden transfer of property from one owner or class of owners to another." *Id.* Where a taking is financed wholly or partly by private interests, however, as in this case, there is a heightened risk that a "purely private taking" could occur, and a more probing review of the "public use" question is required. *See Gettysburg Elec. Ry.*, 160 U.S. at 681; *cf. Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 416-17 (1896).

property and transfer it to a third party was reserved for cases in which it is truly necessary to achieve a legitimate public purpose.[23]

Furthermore, the court of appeals implicitly recognized that a condemnation of a fee simple interest in existing rail property, followed by an immediate reconveyance to a competitor of the original owner, is rarely, if ever, necessary in order to achieve a legitimate public purpose. Pet. App. 19a-23a. Coercive

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[23] It has long been established that the Constitution prohibits any taking of property beyond what is needed for public purposes. As one leading commentator has stated:

> It necessarily follows from the principle that property cannot constitutionally be taken by eminent domain except for the public use, that *no more property can be taken by eminent domain than the public use requires*, since all that might be appropriated in excess of the public needs would not be taken for the public use. While considerable latitude is allowed in providing for the anticipated expansion of the requirements of the public, the rule itself is well established, and applies both to the amount of property to be acquired for public use and to the estate or interest acquired in such property. *If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require* . . . .

J. Sackman, 3 *Nichols on Eminent Domain* § 9.2[2], at 9-16 to -18 (3d ed. 1991) (footnotes omitted) (emphasis added); *see also Warm Springs Irrigation Dist. v. Pacific Live Stock Co.*, 270 F. 560, 562 (9th Cir. 1921); *Silver Bow County v. Hafer*, 532 P.2d 691, 692 (Mont. 1975); *Wilson v. State*, 400 So. 2d 740 (La. App. 1981); *cf. Canal Auth. v. Miller*, 243 So. 2d 131, 133 (Fla. 1970). *See generally Cincinnati*, 281 U.S. at 446-49 (construing an Ohio eminent domain statute narrowly to avoid the serious constitutional issues that would be raised by a taking of excess property).

transfers of this type should be permitted only when the ICC finds that extraordinary circumstances preclude the use of lesser remedies such as an easement or a trackage rights agreement prescribed by the Commission.

In this case, Amtrak certainly alleged that B&M could not be trusted either to upgrade and maintain the line or to allow Amtrak to perform the necessary maintenance. The ICC described these allegations in its decisions, but all three judges on the court of appeals recognized that the Commission *itself* never made a specific determination that "the picture of an intransigent Boston & Maine Railroad drawn by Amtrak is in fact accurate." Pet. App. 4a. (concurring opinion of Judge Ginsburg). At oral argument, ICC counsel was asked specifically whether there was anything in the record to suggest that B&M would be incapable of upgrading and maintaining the track if Amtrak provided the necessary funds. Pet. App. 27a. ICC counsel answered this question in the negative, thereby conceding the most critical point in the case. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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